

FILE COPY

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 115

KERN-LIMERICK INC., AND UNITED STATES OF  
AMERICA, APPELLANTS,

vs.

CARL F. PARKER, COMMISSIONER OF REVENUE  
FOR THE STATE OF ARKANSAS

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

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[Caption omitted]

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IN THE PULASKI CHANCERY COURT

92958

KERN-LIMERICK, INC., PLAINTIFF

vs.

DEAN R. MORLEY, COMMISSIONER OF REVENUES FOR THE STATE OF  
ARKANSAS, DEFENDANT

PETITION—Filed October 22, 1951

On this day comes the plaintiff and files herewith its petition for an appeal from a certain order issued by the defendant, Commissioner of Revenues for the State of Arkansas, on the 24th day of September, 1951, and for its petition states that it is a domestic corporation organized for the purpose, among other things, of engaging in the general business of selling construction machinery and equipment, and defendant is the duly appointed and acting Commissioner of Revenues for the State of Arkansas; that on December 14, 1950, plaintiff sold and delivered to the United States of America f. o. b. Shumaker, Arkansas, two (2) Allis Chalmers HD-5G Diesel tractors at \$8,573.33 each, or for a total price of \$17,146.66; that the sale was made upon the purchase order of the Navy Department, Bureau of Yards and Docks by Winston Bros. Company, C. F. Haglin and Sons Co., The Missouri Valley Constructors, Inc., and Solitt Construction Company, Inc., hereinafter referred to collectively as "WHMS", as the purchasing agent for the United States of America and under their contract with the United States of America designated as NOy 23197, copies of said purchase order form and contract being attached hereto, marked Exhibits A and B, respectively, and made a part hereof; that the United States of America and WHMS refused to pay on the said transaction any tax as a gross receipts tax due under the Arkansas Gross Receipts Act of 1941; that on the 11th day of September, 1951, plaintiff filed with the defendant a gross receipts tax return covering the said transaction and tendered under protest the sum of \$342.93 demanded and claimed by the defendant to be due as a gross receipts tax on the said transaction; that with the said tender plaintiff made demand in writing for the refund of the said payment and requested the defendant to grant a hearing to determine whether the said transaction is taxable under the provisions of The Arkansas Gross Receipts Act of 1941; that the defendant granted plaintiff's request and held said hearing on the 24th day of



September, 1951; and that upon said hearing defendant issued an order finding that the said transaction is taxable and the tax due under the provisions of the said The Arkansas Gross Receipts Act of 1941, but finding that no penalty should be assessed on account of the said tax. A copy of the said order is attached hereto, marked Exhibit C, and made a part hereof.

Plaintiff further states that the said sale was to the United States of America; that the terms of the said sale provided that the United States of America was obligated to pay to the plaintiff the purchase price upon demand by the plaintiff made upon the United States of America, which demand was to be made by submitting to WHMS, as purchasing agent for the United States of America, its invoice covering the said sale; that plaintiff submitted to WHMS, as such purchasing agent, its invoice for payment of the said purchase price in the sum of \$17,146.66; and the said purchase price was paid to plaintiff by WHMS.

Plaintiff alleges (1) that no Arkansas gross receipts tax is due upon the above described transaction for the reason that such sale to the United States of America is exempt from taxation under the provisions of the Arkansas Gross Receipts Act of 1941; (2) that the imposition of a gross receipts tax upon such sale is invalid on the ground that it is repugnant to the Constitution of the United States of America; to-wit: the immunity of the United States of America from taxation by states or political subdivisions thereof; (3) that by imposing a gross receipts tax upon such transaction the defendant has construed and applied The Arkansas Gross Receipts Act of 1941 in a manner which renders that statute invalid under the Constitution of the United States of America.

Wherefore, plaintiff prays that it be granted an appeal from the above described order of the defendant, that the said payment of \$342.93 be refunded to it, that it have judgment for its costs herein, and for all other equitable relief.

KERN-LIMERICK, INC.,

ROSE, MEEK, HOUSE, BARRON & NASH,

By (Signed) WILLIAM NASH,

*Solicitors for Plaintiff.*

[File endorsement omitted.]

(Here follow 2 photos, fols. 6, 7-16)

2A

## EXHIBIT "A" to petition

## PURCHASE ORDER

NAVY DEPARTMENT  
Bureau of Yards and Docks  
By: WINSTON BROS. COMPANY  
C. F. HAGLIN AND SONS CO.  
MISSOURI VALLEY CONSTRUCTORS, INC.  
SOLLITT CONSTRUCTION COMPANY, INC.  
P. O. BOX 5471 - CAMDEN, ARKANSAS  
CONTRACT NC, 21197

PURC. ORDER NO.

REQUISITION NO.

Above numbers MUST appear on all  
invoices, papers and shipments con-  
cerning this order

TO:

Please enter order for items described below in accordance with the  
conditions, terms and instructions noted on the face and reverse side  
of this purchase order

SHIP TO: OFFICER IN CHARGE OF CONSTRUCTION  
c/o WINSTON BROS. COMPANY  
C. F. HAGLIN AND SONS CO.  
MISSOURI VALLEY CONSTRUCTORS, INC.  
SOLLITT CONSTRUCTION COMPANY, INC.  
SHUMAKER, ARK

SHIP VIA:

FOR

PAGE 1 OF

## SELLING CONDITIONS

Invoices must be prepared in duplicate in the name of, and forwarded to,  
the Purchasing Agent whose name appears on the face of this Purchase  
Order. State discount terms on invoices. A separate invoice, certified as  
such shipment. Discount will be based upon the gross amount of invoice  
unless specifically provided otherwise, and will be calculated from date  
is received, whichever is later.

MAIL INVOICE, PACKING LIST AND BILL OF LADING ON DAY SHIP-  
MENT IS MADE TO.

WINSTON BROS. COMPANY  
C. F. HAGLIN AND SONS CO.  
MISSOURI VALLEY CONSTRUCTORS, INC.  
SOLLITT CONSTRUCTION COMPANY, INC.  
P. O. BOX 5471 - CAMDEN, ARKANSAS

DELIVERY

TERMS

Item No.	DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	AMOUNT
ACCOUNT: .....					

APPROVED FOR CONTRACTING OFFICER

WINSTON BROS. COMPANY  
C. F. HAGLIN AND SONS CO.  
MISSOURI VALLEY CONSTRUCTORS, INC.  
SOLLITT CONSTRUCTION COMPANY, INC.  
PURCHASING AGENT FOR THE UNITED STATES OF AMERICA

By: Officer in Charge

By: Purchasing Agent

NAVDOKS-FC-10  
(Rev. 1-55)

ORIGINAL: VENDOR

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BLURRED COPY

## GENERAL PROVISIONS

1. The prime Contractor under the NCO contract referred to on the face of this order as Purchasing Agent is hereinafter referred to as the "Contractor". The United States of America is herein after referred to as the "Government". The term "Secretary of the Navy" includes his duly authorized representatives. The term "Contracting Officer" refers to the Chief of the Bureau of Yards and Docks, Navy Department, and includes his duly authorized representatives. The term "Vendor" refers to the individual, company or corporation named on the face of this order.
2. Vendor shall acknowledge this order promptly and such acknowledgment shall be deemed an acceptance of all the terms and conditions hereof. Vendor shall notify Contractor promptly if shipment will not be made by the date specified.
3. This purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price, but the Contractor shall handle all payments hereunder on behalf of the Government. The vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor. Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor shall not acquire title to any thereof.
4. Vendor shall make shipment on Government bills of lading or by prepaid or collect commercial bills of lading as elected by the Contractor and stated on the face of this order or subsequently communicated to Vendor.
5. No substitution or changes are to be made by the Vendor in this order without express written authority from the Contractor. The Government (acting through the Contractor or otherwise) may from time to time by written order to the Vendor make changes in the specifications for articles ordered, or the quantities, method, time, or rate of shipment of the same, provided, however, that an equitable adjustment shall be made (by agreement between the Contracting Officer and the Vendor) in the purchase price and other pertinent terms of this order to reflect the effect, if any, of such ordered change on the Vendor's cost of performance hereunder. Claim by Vendor, for any such adjustment shall be given to the ordered change, any dispute as to such equitable adjustment being determined as a question of fact under the "Disputes" clause, paragraph 9 of these General Provisions.
6. Vendor shall not assign this order or any monies due or to become due hereunder without the Contractor's prior written consent.
7. No taxes imposed by any state or political subdivisions thereof on the sale of articles covered by this purchase order are included in the prices stated herein. The prices stated herein do include all applicable Federal Excise Taxes.
8. Vendor guarantees that at the time of delivery thereof the articles provided for under this order will be free from any defects in material or workmanship and will conform to the requirements of this order. Notice of any such defect or nonconformance shall be given to the Vendor within one year of the delivery of the defective or nonconforming article. If required by the Government within a reasonable time after such notice, the Vendor shall promptly correct or replace the defective or nonconforming article or part thereof. If the Government does not require correction or replacement, the Vendor, if required by the Government within a reasonable time after the notice of defect or nonconformance, shall repay such portion of the price of the article as is equitable in the circumstances.
9. Except as otherwise specifically provided in this order, all disputes concerning questions of fact arising under this order shall be decided by the Contracting Officer, whose decision shall be final and conclusive. Pending decision, the Vendor shall diligently proceed with performance.
10. There are incorporated herein by reference (with appropriate substitution therein of "Vendor" for "Contractor"): (a) the "Uniform Termination Article for Fixed Price Supply Contracts" and the "Contract Article for Termination for Default" prescribed by the Secretary of the Navy as Enclosures (A) (NPD Par 11.200) and (A-13) (NPD Par 11.341a) respectively to his Contract Termination directive No. 1, dated February 28, 1944 and his directive dated January 25, 1948; and (b) the standard patent article preparation directive No. 1, dated February 28, 1944 and his directive dated October 25, 1948, relating to the patent matters (NPD Par 11.343a). The Vendor shall reserve in all subcontracts or orders relating to this purchase order the right to terminate or cancel such subcontracts or orders upon termination of this purchase order in whole or in part at the option of the Government pursuant to the "Uniform Termination Article for Fixed Price Supply Contracts". Whether or not such right to terminate or cancel such subcontracts or orders upon termination of this purchase order shall be limited to costs allocable to this purchase order, and shall not include anticipatory profits or other damages resulting from the termination or cancellation of such subcontracts or orders.
11. There are incorporated herein by reference (with appropriate substitution therein of "Vendor" for "Contractor"), the following entitled standard clauses prescribed by the Secretary of the Navy for inclusion in the general provisions in all fixed price supply contracts by his directive dated January 25, 1948: (a) "Inspection" (NPD Par 11.232a); (b) "Responsibility for Articles Tendered" (NPD Par 11.232a); (c) "Wash-Hesley Act" (NPD Par 11.231a); (d) "Overtime Compensation of Laborers and Mechanics" (NPD Par 11.232a); (e) "Non-discrimination in Employment" (NPD Par 11.240a); (f) "Officials Not to Benefit" (NPD Par 11.240a); (g) "Covenant against Contingent Fees" (NPD Par 11.274a).
12. If the Vendor is required to pay any taxes which by the terms of this order are excluded from the stated price, then the amount of the payment so made shall be added to the stated price, provided, however, that no such taxes shall be paid without first bringing the matter to the attention of the Contracting Officer, and that the directions given by the Contracting Officer with respect to payment of such taxes and action to be taken regarding refund thereof (any refund to inure to the benefit of the Government) shall be strictly followed.
13. Copies of the provisions incorporated by reference under paragraphs 10 and 11 may be obtained from the Contractor.

## BILLING INSTRUCTIONS

14. The following certificate must appear on both original and duplicate copy of your invoice and be dated and signed in full, in ink, by a person authorized to act for you. The title of the certifying officer must be indicated:

"I certify that the above bill is correct and just; that payment therefor has not been received; that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transactions have been complied with; and that the State or local sales taxes are not included in the amounts billed."

By \_\_\_\_\_

Date \_\_\_\_\_

Title \_\_\_\_\_

In the event the Contractor is required to pay and does pay State or local sales taxes, the words "and that State or local sales taxes are not included in the amounts billed" should be struck from the certification and the following additional certification added:

"The amount of State or local sales, use, occupational, gross receipts, or other similar taxes or license fees imposed on the Vendor or Vendee by reason of this transaction is \_\_\_\_\_. The Vendor, or Vendee, as the case may be, agrees upon direction of the United States to make appropriate claim for refund and in the event of any refund, to pay the amount thereof to the United States."

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EXHIBIT B TO PETITION

NAVDOCKS Form 187, Rev. 1 Sept. 1950

Contract NOy-23197

NEGOTIATED CONTRACT  
COST PLUS A FIXED FEE  
CONSTRUCTION

WINSTON BROS. COMPANY,  
C. F. HAGLIN AND SONS, INC.,  
THE MISSOURI VALLEY BRIDGE & IRON CO.,  
SOLLITT CONSTRUCTION COMPANY, INC.  
(Contractor)

For:

Construction and/or Completion of Facilities

Place:

Naval Ammunition Depot, Shumaker, Arkansas

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NAVDOCKS Form 187, Rev. 1 Sept. 1950

Contract NOy-23197

NEGOTIATED CONTRACT  
COST PLUS A FIXED FEE  
CONSTRUCTION

WHMS COMPANY  
(Contractor)

DEPARTMENT OF THE NAVY  
BUREAU OF YARDS AND DOCKS

Contract for Construction and/or Completion of Facilities.

Place: Naval Ammunition Depot, Shumaker, Arkansas.

Amount (Estimated): \$30,800,000.00.

Payments will be made by: Officer in Charge, U. S. Navy Regional Accounts Office, 9th Naval District, Naval Training Center, Great Lakes, Illinois.

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## CONTRACT FOR CONSTRUCTION

This negotiated contract, entered into as of the 5th day of October 1950 by the United States of America, hereinafter called the Gov-

ernment, represented by the Chief of the Bureau of Yards and Docks, Department of the Navy, hereinafter called the Contracting Officer, and Winston Bros. Company, a corporation organized and existing under the laws of the State of Minnesota; C. F. Haglin and Sons, Inc., a corporation organized and existing under the laws of the State of Minnesota; The Missouri Valley Bridge & Iron Co., a corporation organized and existing under the laws of the State of Kansas; and Sollitt Construction Company, Inc., a corporation organized and existing under the laws of the State of Indiana; acting jointly, having a central office at 1470 Northwestern Bank Building, Minneapolis, Minnesota, hereinafter called the Contractor, Witnesseth: the parties hereto do mutually agree as follows:

ARTICLE 1.—*Work to Be Done and Fixed Fee.*—(a) The Contractor shall construct or otherwise accomplish the completion of the following public works project or projects at the locations indicated, said project(s) being designated by general titles and the estimated cost being stated to indicate generally the degree of magnitude and not a limit of cost, viz:

#### NAVAL AMMUNITION DEPOT, SHUMAKER, ARKANSAS

Project No.	Title of Project	
1	Complete the unfinished TNT Line (TNT 1, South Leg).....	\$ 2,900,000
2	Complete the one partially completed 5" spinner stabilizing rocket line.....	4,345,000
3	Complete the partly finished 11.75" Rocket Line and convert for use in loading 5" and 5.25" Rocket Motors.....	1,706,000
4	Build 120 Magazine (80 Smokeless Powder, 40 H. E. Magazines).....	6,400,000
5	Finish barricaded sidings (10 sidings of 5 car capacity each).....	750,000
21	6 One Supply Warehouse (Approximately 61' x 281')....	300,000
	7 Complete the B. O. Q. (40 men).....	350,000
	8 23 Inert Warehouses.....	1,800,000
	9 Cafeteria.....	754,000
	10 Battery Charging Buildings.....	250,000
	11 Complete Laundry for 1000 man capacity.....	208,000
	12 20 Miles of track, including switches, etc.....	1,604,000
	13 Extension of Utilities.....	6,633,000
	14 Civilian Barracks (500 man).....	800,000
	15 Procure and/or install production equipment.....	2,000,000
		<b>\$30,800,000</b>

(b) The amount of the fixed-fee is \$580,000.00.

(c) The above-mentioned projects designated by general titles may be further indicated by lists of individual projects to be prepared and approved by the Contracting Officer to define with more particularity the scope of the work contemplated by the contract

and such lists may be furnished to the Contractor and be considered to be a part of the contract.

(d) The Contractor shall proceed immediately with the organization of office and field forces to be engaged upon the work under this contract and shall direct his efforts toward early purchases and transportation of materials and the initiation of actual construction work on the site and shall concentrate upon rapid progress and the completion of the entire work at the earliest possible date.

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## PLANS AND SPECIFICATIONS

ARTICLE 2.—(a) The projects indicated in Article 1, as and when accomplished, shall conform to plans and specifications which may be furnished by the Government to the Contractor from time to time during the progress of the work covered by the contract.

(b) The Contractor shall furnish all plans and specifications to supplement those furnished by the Government, which may be determined by the Government, which may be determined by the Officer-in-Charge to be necessary for the accomplishment of the projects. All plans and specifications so furnished by the Contractor shall be subject to approval by the Officer-in-Charge and become the property of the Government.

## CHANGES

ARTICLE 3.—The Contracting Officer may at any time, by a written order, make changes in approved drawings and/or specifications within the general scope of the work required under this contract or suspend, omit, or add projects or parts thereof. If such changes or the addition of any project or omission or suspension of any part of portion of the original project cause a material increase or decrease in the amount or character of the work to be done under this contract, an equitable adjustment of the amount of the fixed-fee to be paid to the Contractor shall be made by the Contracting Officer and upon written notice thereof to the Contractor the contract shall be deemed to be modified in writing accordingly. Any claim by the Contractor for modification of such adjustment must be asserted within 30 days from the date he receives such written notice of adjustment; Provided However, that the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 19 hereof. Nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

## GOVERNMENT OFFICERS

ARTICLE 4.—(a) The Government will designate an officer of the Civil Engineer Corps, U. S. Navy as "Officer-in-Charge of Construction", herein referred to as "Officer-in-Charge", who, under the direction of the Contracting Officer, shall have complete charge, on behalf of the Government, of the work under this contract in the field.

## CONTRACTOR'S ORGANIZATION AND METHODS

A. ARTICLE 5.—(a) The Contractor shall designate a Project Manager or Superintendent who, on behalf of the Contractor shall have complete charge of all work under this contract.

23 (b) The Contractor shall also designate such qualified and experienced engineers as may be required, each of whom, under the direction of the Project Manager shall have charge in the field, on behalf of the Contractor, of such projects or sections or divisions of projects as may be designated by the Contractor.

(c) The Contractor agrees that no representative provided for in this article, nor any other employee occupying a key position in the field organization will be withdrawn or separated from his assignment during the progress of the work except for cogent reasons and after full consultation with the Officer-in-Charge.

(d) Upon the execution of this contract the Contractor shall submit to the Contracting Officer a chart showing the Executive and Administrative personnel to be regularly assigned for full or part time service in connection with the work under the contract, together with a written statement of the duties of each person and the administrative procedure to be followed by the Contractor for the control and direction of the work; and the data so furnished shall be supplemented as additional pertinent data become available. There shall also be submitted to the Contracting Officer by the Contractor charts of the various field organizations showing all personnel, other than artisans, mechanics, helpers and laborers, to be assigned for full or part time service outside the central office organization, together with a written statement of the duties and rates of pay for each person and the procedure proposed to be followed by the Contractor for the accomplishment of all field work, including temporary requirements; and the data so furnished shall be supplemented as additional pertinent data become available.

(e) The Government may award other contracts for work at the site of any work under this contract or may perform work with Government labor and the Contractor shall fully cooperate with any other Contractor and/or Government labor forces and carefully fit his own work to that provided under other contracts or performed by Government labor as may be directed by the Officer-in-Charge. The Contractor shall not commit or permit any act which



will interfere with the performance of work by any other contractor or by Government employees.

#### SERVICES AND LABOR

ARTICLE 6.—(a) All services and labor, including personal services of every character, except such as may be furnished by the Government, required outside the central office organization of the Contractor for the accomplishment of the work under this Contract shall be furnished by the Contractor. The salaries or compensation paid for services and labor shall be subject to the approval of the Contracting Officer.

(b) No person shall be assigned to service by the Contractor as Superintendent of Construction, Chief Engineer, Chief Purchasing Agent, Chief Accountant, or similar position in the field organizations, or as principal assistant to any such person, until his employment has been approved by the Officer-in-Charge. There shall be submitted to the Officer-in-Charge such information as he may request as to the experience, qualifications and former compensation of such persons. Contracts for such services, so far as they shall constitute items of cost to the Government, shall include provisions as to salary or compensation and as to travelling, lodging, subsistence, leaves of absence, and special (if any) allowances, and shall be subject to approval by the Contracting Officer.

(c) The Officer-in-Charge may require the Contractor to dismiss from the work any employee that the Officer-in-Charge deems incompetent, careless, insubordinate, trouble making, or otherwise objectionable.

(d) No persons other than those engaged upon the work under this contract shall be lodged or quartered upon any Naval reservation within which work under the contract is being carried on or be allowed to visit the site of such work except when so authorized by a pass issued by the Officer-in-Charge or superior authorities.

(e) The Contractor shall provide and maintain at the site an efficient and reliable police and guard force, if and as directed by the Officer-in-Charge, for the protection of personnel and property. No person shall be assigned to such force except after approval by the Officer-in-Charge. In the event the site of work to be performed hereunder, as indicated in Article 1, is within the confines of a naval or military activity, all rules and regulations established by the Commanding Officer of the activity relating to the performance of guard and police duties shall be strictly observed.

#### PLANT AND EQUIPMENT

ARTICLE 7. (a) The Contractor shall provide all plant and equipment required for the accomplishment of the work under this con-

tract except such articles or pieces of equipment as shall be purchased by the Government under the terms of Article 8 hereof or be otherwise furnished by the Government, but no article or piece of equipment costing in excess of \$200 shall be purchased and none shall be rented at a rental rate in excess of \$100 per month except after prior approval in writing by the Contracting Officer.

(b) The rental compensation for items of plant and equipment owned, or controlled for use hereunder as if owned, by the Contractor shall be calculated on the basis of cost to the Contractor with no allowance for profit. There will be included unless otherwise financed (1) insurance premiums, if any allowed, (2) depreciation, (3) property taxes, (4) interest on investment, (5) general administration and plant expenses. Rental compensation under this

25 paragraph shall be calculated, for the equipment listed therein, in accordance with such Plant and Equipment Cost and Rental Schedule, as may be required and approved by the Contracting Officer. In the case of any other such items of plant and equipment not listed in said schedule but subsequently furnished, rental compensation under this paragraph shall be calculated in the same manner and upon the same basis.

(c) Fifteen percent (15%) will be retained from all rental compensation payable under this article to provide for proper reimbursement on account of possible savings under the arrangement set forth in said schedule.

(d) All equipment shall be delivered to the work in first class working condition. During the progress of the work repairs shall be made as required by the exigencies of the work. At the end of the work, the equipment shall be placed in as good condition as when delivered to the work, minus ordinary wear and tear for which the depreciation allowance noted above is considered to be adequate compensation. The cost of these repairs shall constitute items of cost under the contract.

(e) In calculating payments for plant rentals no deduction from or additions to the normal monthly rates shall be made on account of idle time or shift work, respectively.

(f) In calculating the actual rental costs the total allowance for "depreciation" shall not exceed 50% of the "insurable value" of the equipment when it was delivered to the work.

(g) The Contracting Officer may in his discretion and on behalf of the Government, take possession at any place he may elect of any item of plant or equipment for the purpose of transporting it to the site where it is to be used or held for further disposition and may subsequently return any such item to the possession of the Contractor for use on the work.

(h) Final disposition of all items of the Government plant and equipment shall be made as directed by the Contracting Officer.

(i) The title of each item of plant and equipment purchased for the Government passes directly from the vendor to the Government as set forth in Article 8 hereof.

(j) The Contractor agrees to use such items of plant and equipment and such shop, storage, transportation, communication, and other facilities owned by the Government as may be available to him and as directed by the Officer-in-Charge.

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## MATERIALS—PURCHASES

ARTICLE 5.8—(a) Except where provision is otherwise made by the Officer-in-Charge, all materials, articles, supplies, and equipment required for the accomplishment of the work under this contract shall be furnished by the Contractor. The Contractor shall act as the purchasing agent of the Government in effecting such procurement and the Government shall be directly liable to the vendors for the purchase price. The exercise of this agency is subject to the obtaining of approval in the instances and in the manner required by subparagraph (c) of this article. The Contractor shall negotiate and administer all such purchases and shall advance all payments therefor unless the Officer-in-Charge shall otherwise direct.

(b) Title to all such materials, articles, supplies and equipment, the cost of which is reimbursable to the Contractor hereunder, shall pass directly from the vendor to the Government without vesting in the Contractor, and such title (except as to property to which the Government has obtained title at an earlier date) shall vest in the Government at the time payment is made therefor by the Government or by the Contractor or upon delivery thereof to the Government or the Contractor, whichever of said events shall first occur. This provision for passage of title shall not relieve the Contractor of any of its duties or obligations under this contract or constitute any waiver of the Government's right to absolute fulfillment of all of the terms hereof.

(c) No purchase in excess of \$500 shall be made hereunder without the prior written approval of the Officer-in-Charge, except that the Officer-in-Charge may, in his discretion, either reduce the limitation on the amount of any purchase which may be made without such prior approval or authorize the Contractor to make purchases in amounts not in excess of \$2500 for any one purchase without obtaining such prior approval.

(d) No subcontract shall be entered into by the Contractor without the prior written approval of the Officer-in-Charge.

(e) Each cost-plus-a-fixed-fee subcontract shall, unless otherwise directed by the Contracting Officer, provide that the subcontractor shall act as the purchasing agent of the Government to the extent and with the same authority as that specified in subparagraph (a) of this article in regard to such action by the Contractor, and shall

likewise provide that title to purchases for which the subcontractor is entitled to reimbursement shall pass to the Government in the same manner as that specified in subparagraph (b) of this article in regard to purchases for the cost of which the Contractor is entitled to reimbursement.

(f) The Officer-in-Charge may take charge of any materials, articles, supplies, or equipment, procured under this contract for the purpose of transporting them to the site where they are to be used or held for further disposition.

27 (g) Final disposition of excess items furnished hereunder shall be made as directed by the Officer-in-Charge.

#### LICENSES AND PERMITS

ARTICLE 9.—The Contractor shall determine what permits or licenses are required in connection with the accomplishment of the work under this contract and, with the approval of the Officer-in-Charge, shall take the necessary action to secure the same as required: Provided, That all sites of the work covered by this contract and essential working spaces adjacent thereto which are owned by or under the control of the Government will be made available to the Contractor by the Government. Any such permits or licenses issued by any Federal Government Department or agency will, upon request made by the Contractor, be procured by the Contracting Officer.

#### COMPENSATION

ARTICLE 10.—(a) The Government, in consideration of the strict performance by the Contractor of his covenants and agreements herein contained, shall pay to the Contractor the sum of the actual net cost, as hereinafter specified and supported by proper documents, paid by the Contractor in accordance with the provisions of this contract in the accomplishment of the work, plus the fixed-fee stated in Article 1(b).

(b) In the aforesaid net cost there shall not be included any cost which is unallowable for reimbursement under the provisions of Part 4, Section XV of the Armed Services Procurement Regulation. Specifically, but without limiting the generality of the foregoing, reimbursement shall not be allowed for any cost of financing the contract, any interest on moneys, any commission, percentage, brokerage or contingent fee within the prohibition of Article 29 hereof, legal, accounting and consulting fees and related expenses except as may be specifically authorized by the Contracting Officer, rent of the regular central offices of the Contractor, services or travelling expenses of any officer or employee included in the central office organization of the Contractor except as may be specifically authorized by the Contracting Officer, regular central office supplies

and equipment or operating expense or any other expense incident to the maintenance and operation of said regular central office organization. In determining the actual net cost of articles and materials of every kind required for the purposes of this contract, there shall be deducted from the gross cost thereof all cash and trade discounts, rebates, allowances, credits, salvage values and commissions which have accrued to the benefit of the Contractor, or would have so accrued except for the fault or neglect of the Contractor. Such benefits lost through no fault of the Contractor shall not be deducted from gross cost. The Contractor shall, to the extent of his ability, take advantage of all such benefits and if unable to do so in any instance, shall promptly notify the Officer-in-Charge in writing to that effect and the reason therefor.

28 (c) It is the general intent and understanding by and between the parties to this contract that the Contractor shall be reimbursed for all out-of-pocket advances and expenditures made by the Contractor incident to the performance of the contract and in accordance with its provisions which are allowable as determined by the Contracting Officer for reimbursement under the provisions of Part 4, Section XV of the Armed Services Procurement Regulation. The term "actual net cost" shall include specifically, but not necessarily exclusively, the following:

(1) The actual net cost paid by the Contractor for all items of plant and equipment purchased by the Contractor for the Government in accordance with Article 8 hereof, with the approval of the Officer-in-Charge and the amount of rental approved by the Contracting Officer for plant and equipment owned or procured by the Contractor under the provisions of Article 7 hereof, for use in connection with the work under this contract, including such insurance, transportation, and other collateral expense, incidental thereto, as the Officer-in-Charge may approve.

(2) The actual net cost to the Contractor of all services, labor, transportation, and subsistence furnished under the provisions of Article 6 hereof, including the cost of hiring, medical examination, transportation, hospitalization, subsistence, leave and holiday pay, advertising as related to "help wanted", and other usual expenses incident to the employment of labor as may be authorized by the Officer-in-Charge.

(3) The actual net cost paid by the Contractor for all materials procured in accordance with the provisions of Article 8 hereof, including purchasing, inspecting, storing, transporting, salvaging, and other usual expenses incident to the procurement and use of materials, as may be authorized by the Officer-in-Charge.

(4) The actual net cost to the Contractor, if any there be, in addition to payments otherwise authorized, of inspections made

under the provisions of Article 16 hereof, reimbursement being limited as therein provided.

(5) The actual net cost to the Contractor, if any there be, in addition to payments otherwise authorized, of changes made under the provisions of Article 3 hereof.

(6) The amount, other than that allocable to the fixed-fee, found due to the Contractor upon settlement in the event this contract is terminated under the provisions of Article 18 hereof.

(7) The actual net cost to the Contractor of any licenses or permits secured by him under the provisions of Article 9 hereof.

(8) The actual net cost to the Contractor, if any there be, in addition to payments otherwise authorized, for any guard or police forces provided by him under the provisions of Article 6 hereof.

29 (9) The actual net cost to the Contractor, if any there be, in addition to payments otherwise authorized, in connection with the keeping of records and books of accounts under the provisions of Article 17 hereof.

(10) The actual net cost to the Contractor of any licenses or royalties furnished or paid by him with the approval of the Contracting Officer.

(11) The actual net cost to the Contractor of the rental and maintenance of any land, space or structures or the erection of structures and/or facilities required for temporary use in connection with the accomplishment of this contract as may be authorized by the Officer-in-Charge and for which payment is not otherwise authorized.

(12) The actual net cost to the Contractor of communication service necessary for the purposes of this contract, including telegrams, telephone service, radio messages, postage, couriers, and other means, as may be authorized by the Officer-in-Charge and for which payment is not otherwise authorized.

(13) The net amount of any U. S. taxes and any state, territorial or local taxes, fees, or charges (except taxes or other exactions imposed upon, by reason of, or measured by the Contractor's fee) which the Contractor may be required, on account of this contract to pay on or for any plant, equipment, process, organization, materials, or personnel, or otherwise on account of the performance of the contract, under any applicable valid law or regulations issued by competent authority. The Contractor shall take such action in respect to protesting and/or suing to recover such taxes or any part thereof as the Contracting Officer may direct.

(14) The actual net cost to the Contractor of liabilities (including expenses incidental thereto) to third persons to the extent that reimbursement is provided in Article 13 hereof.

(15) The actual net cost to the Contractor of insurance to the extent that reimbursement is provided in Article 13 hereof and of



any bonds or special insurance required in connection with this contract by direction or with the approval of the Government.

(16) Any amount found by the Contracting Officer to be due to the Contractor upon settlement after final acceptance of all work accomplished under this contract.

(17) Losses or expenses not compensated by insurance or otherwise (including settlements made with the written consent of the Contracting Officer) actually sustained by the Contractor in connection with the work and found and certified by the Contracting Officer to be just and reasonable and to be reasonably incident to

work of the nature and magnitude of that contemplated by this contract, unless reimbursement therefor is especially prohibited by the terms of this contract or is considered unallowable under the provisions of Part 4, Section XV of the Armed Services Procurement Regulation: Provided, That such reimbursement shall not include any amount for which the Contractor would have been indemnified or compensated by insurance except for failure of the Contractor to procure or maintain bonds or insurance in accordance with the requirements of the Government pursuant to the provision of Article 13 of this contract.

#### PAYMENTS

ARTICLE 11.—(a) The Contractor may submit to the Officer-in-Charge at intervals of not less than seven calendar days unless otherwise authorized by the Officer-in-Charge, payment requisitions accompanied by duly certified and approved payrolls, paid invoices, paid bills and other substantiating documents, including the Contractor's bill on account of the prescribed fixed-fee, all equaling the amount of the requisition. Payment requisitions covering all items shall be submitted to the Officer-in-Charge. As soon as practicable after the receipt and audit by the Officer-in-Charge of such payment requisition there will be prepared a Public Voucher, in the amount of such requisition as is approved by the Officer-in-Charge, which voucher shall be signed by a duly authorized representative of the Contractor, and thereafter by the Officer-in-Charge, and thereupon transmitted to such Naval Disbursing Officer as may be designated by the Contracting Officer for issuance and delivery of a Government check drawn payable to the order of the Contractor. The Officer-in-Charge shall have the right to defer approval of payments at any time in an amount not to exceed ten percentum of all payments previously made on account of the Contractor's fees if in his judgment such action is necessary to protect properly the interests of the Government.

(b) Subject to the withholding provisions of the preceding paragraph, partial payments on account of the fixed-fee shall be in the same proportion to such fee as payments of reimbursable costs to the

Contractor, plus the value of Government-furnished materials in place, are to the total estimated cost of the work, including the total value of materials to be furnished by the Government, but exclusive of fee.

(c) After payment of eighty percent (80%) of the total estimated cost, further payment shall be withheld until a reserve of not less than \$100,000 shall have been set aside, such reserve to be paid to the Contractor at the time of final payment except when otherwise authorized by the Contracting Officer. The Contractor and each assignee under an assignment in effect at the time of final payment shall execute and deliver at the time of and as a condition precedent to final payment, a release in form and substance satisfactory to and containing such exceptions as may be found appropriate by the Contracting Officer, discharging the Government, its officers, agents and employees of and from liabilities, obligations and claims arising under this contract. The estimated cost referred to in the first sentence of this paragraph is the estimated cost exclusive of the estimated amounts of the property to be furnished by the Government (if any) as such estimated amount may be determined or modified from time to time by the Contracting Officer.

#### PROPERTY LOSS OR DAMAGE

ARTICLE 12.—(a) The Contractor is requested not to carry, or incur the expense of any insurance against any form of loss of or damage to equipment or materials furnished by the Government hereunder, or any property to which the Government has taken and continues to hold title hereunder and no reimbursement will be allowed for such insurance premium expenses.

(b) The Government assumes the risk of loss of or damage to such property, whether or not caused by the negligence of the Contractor, his agents, servants, or employees, including expenses incidental to such loss or damage. Notwithstanding the foregoing assumption of risk, the Contractor shall be responsible for any loss or damage for which he is expressly made responsible under any other provision of this contract, or which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors, officers or any of his other representatives having supervision or direction individually or collectively of all or substantially all of the Contractor's operations under this contract.

#### LIABILITY TO THIRD PERSONS

ARTICLE 13.—(a) The Contractor shall procure and thereafter maintain workmen's compensation, employer's liability, and bodily injury liability insurance, with respect to work done hereunder, and such other liability insurance with respect to such work as the



Contracting Officer may from time to time require or approve. All such insurance shall be in such form, in such amounts, for such periods of time, and with such insurers, as the Contracting Officer may from time to time require or approve.

(b) The Contractor shall be reimbursed (1) for the cost of such insurance of the character described in paragraph (a) of this article as may be required or approved by the Contracting Officer and (2) for liabilities to third persons for loss of or damage to property, death or bodily injury not compensated by insurance or otherwise, arising out of and incurred during the performance of this contract, whether or not caused by the negligence of the Contractor, its agents, servants, or employees, provided such liabilities are represented by final judgments or by settlements approved in writing by the Contracting Officer, and expenses (as authorized by the Contracting Officer), incidental to such liabilities, except liabilities (i) for which the Contractor is otherwise responsible under the express terms of this contract, or (ii) with respect to which the Contractor has failed to insure as required or approved by the Contracting Officer, or (iii) which result from willful misconduct  
32 or lack of good faith on the part of any of the Contractor's directors or officers or of any of its other representatives having supervision or direction of all or substantially all of the Contractor's operations under this contract.

#### NOTICE OF CLAIMS

ARTICLE 14.—The Contractor shall give the Contracting Officer immediate notice of any suit or action filed, or any claim made, against the Contractor arising out of the performance of this contract, the cost and expense of which is reimbursable to the Contractor under the provisions of this contract, and the risk of which is then uninsured or in which the amount claimed exceeds the amount of insurance coverage. The Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor. If the amount of the liability claimed exceeds the amount of insurance coverage, the Contractor shall authorize representatives of the Government to collaborate with counsel for the insurance carrier, if any, in settling or defending such claim. If the liability is not insured, the Contractor shall, if required by the Contracting Officer, authorize representatives of the Government to settle or defend any such claim and to represent the Contractor in or take charge of any litigation in connection therewith.

#### GRADE OF MATERIALS AND WORKMANSHIP

ARTICLE 15.—Unless otherwise authorized by the Officer-in-Charge, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract or provided for tempo-

rary use are to be of the most suitable grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in specifications as "equal to" any particular standard, the Contracting Officer shall decide the question of equality. When required by specifications, or when called for by the Officer-in-Charge, the Contractor shall furnish to the Contracting Officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed by the Officer-in-Charge.

#### INSPECTION

ARTICLE 16.—(a) All materials and workmanship, except as may be otherwise provided herein or otherwise authorized by the Officer-in-Charge, shall be subject to inspection, examination, and test by Government inspectors, or inspectors employed by the Contractor with the approval of the Officer-in-Charge, at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with the proper material, and the Contractor shall promptly segregate and remove the rejected items from the premises.

33 (b) The Contractor shall furnish promptly all reasonable facilities, labor and materials necessary for the safe and convenient inspection and tests that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to delay the work unnecessarily. Special, full size, and performance tests shall be as specified.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed by removing or tearing out same, the Contractor shall on request of the Officer-in-Charge promptly furnish all necessary facilities, labor, and material for the purpose.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in specifications; and such inspection and acceptance in writing unless otherwise stated in specifications shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding

sentence, the inspection of materials and workmanship for final acceptance as a whole or in part shall be made at the site.

(e) The actual net cost to the Contractor of labor, facilities, and material necessarily incident to the inspections provided in this article including the correction or replacement of defective material and workmanship and of reconstruction, shall be allowed the Contractor as a reimbursable cost, provided, however, that in the event of disclosure of defects resulting from gross negligence or fraud of the Contractor, the cost of the examination and of satisfactory correction, replacement or reconstruction in respect of such defects shall be borne by the Contractor and he is expressly made responsible therefor without right of reimbursement hereunder.

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## RECORDS AND ACCOUNTS

ARTICLE 17.—(a) The Contractor shall keep books, records, documents and other evidence (herein collectively called 'the records') bearing on its costs and expenses under this contract and in respect of any termination of work hereunder. The Contractor's method of accounting shall be in accordance with the Bureau of Yards and Docks 'Manual of Accounting, Auditing, and Control for Negotiated Cost-plus-a-fixed-fee Contracts', subject to such modifications therein as may be authorized or directed by the Contracting Officer.

(b) The Contractor shall furnish to the Department of the Navy upon request such of the records as may be required by the General Accounting Office.

(c) Except for such of the records furnished by the Contractor to the Department of the Navy pursuant to paragraph (b) of this Section and retained by the Department of the Navy, or the General Accounting Office, the Contractor shall preserve the records pertaining to this contract and keep the Contracting Officer advised of the location of such records; provided, however, that if the Contractor, at any time after the lapse of five years following the date upon which final payment under this contract becomes due, desires to dispose of the records, he shall so notify the Contracting Officer, who shall either authorize their destruction to the extent permitted by law or notify the Contractor to turn them over to the Government for disposition and the Contractor shall promptly comply with such notice. The cost of storage and all other charges incidental to the preservation of the records incurred after the completion of this contract as determined by the Officer-in-Charge shall not be reimbursable under the terms of this contract.

(d) The Officer-in-Charge shall at all reasonable times have access to the records pertaining to this contract.

(e) The provisions of this article shall be applicable to and

included in each fixed price adjusted cost or cost-plus-a-fixed-fee contract entered into by the Contractor incident to the performance of this contract.

#### TERMINATION

ARTICLE 18.—(a) The performance of work under the contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever for any reason the Contracting Officer shall determine that such termination is in the best interests of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying whether termination is for the default of  
35 the Contractor or for the convenience of the Government, the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination and except as otherwise directed by the Contracting Officer, the Contractor shall (1) stop work under the contract on the date and to the extent specified in the Notice of Termination; (2) place no further orders or subcontracts for materials, services or facilities except as may be necessary for completion of such portion of the work under the contract as is not terminated; (3) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination; (4) assign to the Government, in the manner and to the extent directed by the Contracting Officer, all of the right, title and interest of the Contractor under the orders or subcontracts so terminated; (5) with the approval or ratification of the Contracting Officer, which approval or ratification shall be final and conclusive for all the purposes of this clause, settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, the cost of which would be reimbursable, in whole or in part, in accordance with the provisions of this contract; (6) transfer title (to the extent that title has not already been transferred) and, in the manner, to the extent and at the times directed by the Contracting Officer, deliver to the Government (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in respect of the performance of, the work terminated by the Notice of Termination, (ii) the completed or partially completed plans, drawings, information and other property which, if the contract had been completed, would be required to be furnished to the Government, and (iii) the jigs, dies, fixtures, and other special tools and tooling acquired or manufactured for the performance of this contract for the cost of which the Contractor has been or will be reimbursed under this contract; (7) use his best efforts to sell in the

manner, at the times, to the extent, and at the price or prices directed or authorized by the Contracting Officer, any property of the types referred to in provision (6) of this paragraph, *provided, however*, that the Contractor (i) shall not be required to extend credit to any purchaser, and (ii) may keep any such property at a price or prices approved by the Contracting Officer; and provided further that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be paid in such manner as the Contracting Officer may direct; (8) complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and (9) take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has or may acquire an interest. The Contractor shall proceed

36 immediately in the performance of the above obligations, notwithstanding any delay in determining or adjusting the amount of the fixed-fee, or any item of reimbursable cost, under this clause.

(c) The Contracting Officer in his discretion may, and at the request of the Contractor, shall, limit the negotiations for settlement to the fixed-fee, if any, in which event any costs allocable to the terminated portion of the contract shall continue to be presented for payment by the Contractor on prescribed cost vouchers. Promptly upon issuance of the Notice of Termination, the Contracting Officer shall inform the Contractor in writing either: (i) that the settlement will be limited to the fixed-fee; or (ii) that the settlement will include costs and fixed-fee unless the Contractor, within thirty days, requests in writing that they be limited to the fixed-fee.

(d) After receipt of a Notice of Termination and after it has been decided whether or not the settlement is to be limited to the fixed-fee, the Contractor shall submit to the Contracting Officer its termination claim. Such claim shall be submitted promptly but in no event later than one year from the effective date of termination, unless one or more extensions in writing are granted by the Contracting Officer upon request of the Contractor made in writing within such one year period or authorized extension thereof. Upon failure of the Contractor to submit its termination claim within the time allowed, the Contracting Officer shall determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination.

(e) Subject to the provisions of paragraphs (c) and (d), the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by

reason of the total or partial termination of work pursuant to this clause. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount.

(f) In the event of the failure of the Contractor and the Contracting Officer to agree in whole or in part, as provided in paragraph (e) above, as to the amounts with respect to costs and fixed-fee or as to the amount of the fixed-fee, to be paid to the Contractor in connection with the termination of work pursuant to this clause, the Government, but without duplication of any amounts agreed upon in accordance with paragraph (e), shall pay to the Contractor the amounts determined as follows:

(1) *If the settlement includes costs and fixed-fee*

(i) There shall be included therein all costs and expenses reimbursable in accordance with this contract, not previously paid  
37 to the Contractor for the performance of this contract prior to the effective date of the Notice of Termination, and such of these costs as may continue for a reasonable time thereafter with the approval of or as directed by the Contracting Officer, provided however, that the Contractor shall proceed as rapidly as practicable to discontinue such costs.

(ii) There shall be included therein the cost, so far as not included under (i) above (which cost may include a reasonable allowance for profit to the subcontractor or vendors, but only on work done in connection with the terminated portion of any subcontract or order), of settling and paying claims arising out of the termination of work under subcontracts or orders, as provided in paragraph (b) (5) above, which are properly chargeable to the terminated portion of the contract, provided that:

(A) Each such claim has been settled with the written approval of the Contracting Officer; or

(B) If a final judgment has been rendered against the Contractor, a subcontractor or vendor by a court of competent jurisdiction determining the liability of the Contractor, subcontractor or vendor with respect to any such claim, the Contracting Officer has determined that such judgment or a part thereof is allocable to the terminated portion of the contract.

In order for a judgment to be allowable under this subparagraph (ii), the Contractor, subcontractor or vendor concerned must have given the Contracting Officer prompt notice of the initiation of the proceedings in which such judgment was rendered and offered in writing to give the Government complete control of the defense of the proceedings, and must have diligently defended the suit, or, if the Government has assumed control of the defense of the proceedings, must have rendered such reasonable assistance as has been



38 requested by the Government. If such judgment includes amount for loss of anticipatory profits or consequential damages, such amounts will not be allowable under this subparagraph.

(iii) There shall be included therein the reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of termination inventory.

(iv) There shall be included therein a portion of the fixed-fee payable under the contract, determined as follows:

In the event of the termination of this contract for the convenience of the Government there shall be paid a percentage of the fee equivalent to the percentage of the completion of work contemplated by the contract, less fixed-fee payments previously made hereunder.

If the amount determined under this subparagraph is less than the total payment of fixed-fee theretofore made to the Contractor, the Contractor shall repay to the Government the excess amount.

(2) If the settlement includes only the fixed-fee, the amount thereof will be determined in accordance with subparagraph (f) (i) (iv) above.

(g) The Contractor shall have the right of appeal under the clause of this contract entitled "Disputes", from any determination of the amount due to the Contractor made by the Contracting Officer under paragraphs (d) or (f) above, except that if the Contractor has failed to submit its claim within the time provided in paragraph (d) above and has failed to request extension of such time, he shall have no such right of appeal. In any case where the Contracting Officer has made a determination of the amount due under paragraph (d) or (f) above the Government shall pay to the Contractor the following: (i) if there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the Contracting Officer, or (ii) if an appeal has been taken, the amount finally determined on such appeal; any such determination being final and conclusive upon the Contractor and the Government.

39 (h) In arriving at the amount due the Contractor under this clause there shall be deducted (1) all unliquidated advance or other unliquidated payments theretofore made to the Contractor, (2) any claim which the Government may have against the Contractor in connection with this contract, and (3) the agreed price for, or the proceeds of sale of, any materials, supplies or other things kept by the Contractor or sold pursuant to the provisions of

this clause and not otherwise recovered by or credited to the Government.

(i) In the event of a partial termination, the portion of the fixed-fee which is payable with respect to the work under the continued portion of the contract shall be equitably adjusted by agreement between the Contractor and the Contracting Officer, and such adjustment shall be evidenced by an amendment to this contract.

(j) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of the contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate of 6% per annum, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government.

(k) Unless otherwise provided for in this contract, or by applicable statute, the Contractor for a period of five years after final settlement under this contract shall preserve and make available to the Government at all reasonable times at the office of the Contractor, but without expense to the Government, all its books, records, documents, and other evidence bearing on the cost and expenses of the Contractor under this contract and relating to the work terminated, or, to the extent approved by the Contracting Officer, photographs, microphotographs, or other authentic reproductions thereof.

#### DISPUTES

ARTICLE 19.—Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a  
40 written appeal addressed to the Secretary, and the decision of the Secretary of his duly authorized representative for the hearing of such appeals shall be final and conclusive; provided, that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal.



Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

#### MILITARY SECURITY REQUIREMENTS

ARTICLE 20.—(a) The provisions of the following paragraphs of this clause shall apply only if and to the extent that this contract involves access to classified matter, which as used in this clause shall mean information or material classified "Top Secret", "Secret", "Confidential", or "Restricted".

(b) The Contractor (i) shall be responsible for safeguarding all classified matter and shall not supply or disclose classified matter to any unauthorized person, (ii) shall not make or permit to be made any reproductions of classified matter except as may be essential to performance of the contract and shall submit to the Contracting Officer, at such times as the Contracting Officer may direct, an accounting of all reproductions of classified matter, (iii) shall not incorporate in any other project any special features of design or construction which will disclose classified matter, except with the prior written authorization of the Contracting Officer.

(c) Except with the prior written consent of the Secretary or his duly authorized representative, the Contractor (i) shall not permit any alien to have access to classified matter, and (ii) shall not permit any individual to have access to matter classified "Top Secret" or "Secret".

(d) The Contractor agrees (i) to submit immediately to the Contracting Officer a complete confidential report of any information which the Contractor may have concerning existing or threatened espionage, sabotage, or subversive activity, (ii) to submit to the Contracting Officer, upon written request, any and all information which the Contractor may have concerning any of its employees engaged in any work at any plant, factory, or site at which work under this contract is being performed, and (iii) to exclude from its plant, factory, site, or part thereof, at which work under this contract is being performed, any person or persons whom the Secretary or his duly authorized representative, in the interest of security, may designate in writing.

41 (e) The Contractor is authorized to rely on any letter or other written instrument signed by the Contracting Officer, changing or entirely removing the classification of this contract or of any classified matter.

(f) The obligations of the Contractor under this clause shall be in addition to any obligations of the Contractor to comply with all the terms and provisions of any applicable security or secrecy agreement theretofore or hereafter entered into between the Contractor and the Government.

(g) The Contractor agrees to insert, in all subcontracts hereunder which involve access to classified matter, provisions which shall conform substantially to the language of this clause, including this paragraph (g); *provided*, that such provisions need not be included in any subcontract as to which the Contracting Officer shall consent to the omission of such provisions.

#### TRANSFER OF CONTRACT AND ASSIGNMENT OF CONTRACTOR'S CLAIMS

ARTICLE 21.—(a) Neither this contract, nor any interest herein except as otherwise provided in this article, shall be transferred by the Contractor to any other party or parties.

(b) Pursuant to the provisions of the Assignment of Claims Act of 1940 (Act of October 9, 1940; 31 U. S. Code 203, 41 U. S. Code 15), if this contract provides for payments aggregating \$1,000 or more, claims for moneys due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and re-assigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Notwithstanding any provision of this contract, payment to an assignee of any claim under this contract shall not be subject to reduction or set-off for any indebtedness of the Contractor to the Government arising independently of this contract.

(c) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked "Top Secret", "Secret", "Confidential", or "Restricted", be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same;

*provided* that a copy of any part or all of this contract so  
42 marked may be furnished, or any information contained therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer.

#### DAVIS-BACON ACT

ARTICLE 22.—This contract, to the extent that it is of a character specified in the Davis-Bacon Act as amended (40 U. S. Code 276a), is subject to all provisions and exceptions of said Davis-Bacon Act, including in particular the following:

(a) The Contractor and his subcontractors shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subse-

quent deductions or rebate on any account (except such pay-roll deductions as are permitted by applicable regulations prescribed by the Secretary of Labor), the full amounts accrued at time of payment computed at wage rates not less than those stated in the Exhibit "A", regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and such laborers and mechanics; and the scale or wages to be paid shall be posted by the Contractor in a prominent and easily accessible place at the site of the work.

(b) The Contracting Officer shall have the right to withhold from the Contractor so much of accrued payments as may be considered necessary by the Contracting Officer to pay to laborers and mechanics employed on the work the difference between (i) the rates of wages required by the contract to be paid laborers and mechanics on the work and (ii) the rates of wages received by such laborers and mechanics and not refunded to the Contractor, subcontractors, or their agents.

(c) In the event it is found by the Contracting Officer that any laborer or mechanic employed by the Contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Contracting Officer may (i) by written notice to the Contractor, terminate his right to proceed with the work, or such part of the work as to which there has been a failure to pay said required wages, and (ii) prosecute the work to completion by contract or otherwise, whereupon the Contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

#### 42a

#### EIGHT-HOUR LAW

ARTICLE 23.—This contract, to the extent that it is of a character specified in the Eight-Hour Law of 1912 as amended (40 U. S. Code 324-326) and is not covered by the Walsh-Healey Public Contracts Act (41 U. S. Code 35-45), is subject to the following provisions and exceptions of said Eight-Hour Law of 1912 as amended, and to all other provisions and exceptions of said Law:

No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of the said work, shall be required or permitted to work more than eight hours, in any one calendar day upon such work, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this clause. The wages of every such laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day; and work in excess of eight hours per day is permitted only

upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this clause a penalty of five dollars shall be imposed upon the Contractor for each such laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this clause; and all penalties thus imposed shall be withheld for the use and benefit of the Government.

#### CONVICT LABOR

ARTICLE 24.—In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor.

#### NON-DISCRIMINATION IN EMPLOYMENT

ARTICLE 25.—In connection with the performance of work under this contract, the Contractor agrees not to discriminate against any employee or applicant for employment because of race, creed, color, or national origin; and further agrees to insert the foregoing provision in all subcontracts hereunder except subcontracts for standard commercial supplies or for raw materials.

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#### COPELAND ACT

ARTICLE 26.—To the extent that this contract is of a character specified in the Copeland ("Anti-Kickback") Act as amended (18 U. S. Code 874 and 40 U. S. Code 276c), the Contractor agrees to comply with the regulations, rulings, and interpretations of the Secretary of Labor pursuant to said Copeland Act, which Act makes it unlawful to induce any person employed in the construction or repair of public buildings or public works to give up any part of the compensation to which he is entitled under his contract of employment; and the Contractor agrees to insert a like provision in all subcontracts hereunder.

#### LABOR STATISTICS

ARTICLE 27.—The Contractor shall report, and shall by agreement require his subcontractors to report, at such times, in such manner, and covering such matters as the Officer-in-Charge may direct, such labor statistics, applicable only to work performed under this contract at the site of the work, as may be required for transmittal to the Department of Labor.

#### OFFICIALS NOT TO BENEFIT

ARTICLE 28.—No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract,

or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

#### COVENANT AGAINST CONTINGENT FEES

ARTICLE 29.—The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

#### BUY-AMERICAN ACT

ARTICLE 30.—The Contractor agrees that in the performance of the work under this contract the Contractor, subcontractors, material men and suppliers shall use only such unmanufactured articles, materials and supplies (which term "articles, materials and supplies" is hereinafter referred to in this clause as "supplies") as have been mined or produced in the United States, and only such manufactured supplies as have been manufactured in the United States

44 substantially all from supplies mined, produced, or manufactured, as the case may be, in the United States. Pursuant to the Buy-American Act (41 U. S. Code 10 a-d), the foregoing provisions shall not apply (i) with respect to supplies excepted by the Secretary from the application of that Act, (ii) with respect to supplies for use outside the United States, or (iii) with respect to the supplies to be used in the performance of work under this contract which are of a class or kind determined by the Secretary or his duly authorized representative not to be mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or (iv) with respect to such supplies, from which the supplies to be used in the performance of work under this contract are manufactured, as are of a class or kind determined by the Secretary or his duly authorized representative not to be mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality provided that this exception (iv) shall not permit the use in the performance of work under this contract of supplies manufactured outside the United States if such supplies are manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

## RENEGOTIATION

ARTICLE 31.—(a) This contract is subject to the Renegotiation Act of 1948.

(b) The Contractor (which term as used in this clause means the party contracting to furnish the articles or perform the work required by this contract) agrees, within thirty days after receipt of its signed copy of this contract, to notify the Military Renegotiation Policy and Review Board, Office of the Secretary of Defense, Washington 25, D. C., of such contract, indicating its own name and address; provided that, if the Contractor has previously reported to the Military Renegotiation Policy and Review Board any contract or purchase order subject to the Renegotiation Act of 1948, such notification shall not be necessary.

(c) The Contractor agrees to insert the provisions of this clause, including this paragraph (c), in all contracts or purchase orders in excess of \$1,000 to make or furnish any article or to perform  
45 all or any part of the work required for the performance of this contract; provided, that the Contractor shall not be required to insert the provisions of this clause in any contract or purchase order of a class or type described in subsection (i) (1) of the Renegotiation Act of February 25, 1944, as amended, or in any contract or purchase order of a class or type which has been exempted by the Secretary of Defense or by the Military Renegotiation Policy and Review Board.

## PATENT INDEMNITY

ARTICLE 32.—(a). The Contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from patent liability of any nature or kind, including costs and expenses, for or on account of any patented or unpatented invention made or used in the performance of this contract, including the use or disposal thereof by or on behalf of the Government: Provided, That the foregoing shall not apply to inventions covered by applications for United States Letters Patent which, on the date of execution of this contract, are being maintained in secrecy under the provisions of Title 35, U. S. Code (1940 ed.) Section 42, as amended; Provided further, That this Article is not, and shall not be construed to be, applicable to any infringement of United States Letters Patent which results from the Contractor's complying with specific written instructions furnished by the Government, or where infringement is occasioned by the use of an apparatus patent due to the fabrication, installation, or operation of apparatus in accordance with plans and specifications furnished to the Contractor by the Government.



(b) The Contractor shall promptly notify the Government in writing of any and all claims of infringement relating to this contract that may be brought to the Contractor's attention and in case of litigation on account thereof, the Contractor shall assist the Government at the latter's expense, save for services of the Contractor's employees, in furnishing such evidence as to the use of the patents and other matters of fact as may be required by the Government in such litigation.

#### AUTHORIZATION AND CONSENT FOR USE OF PATENTS

ARTICLE 33.—The Government hereby gives its authorization and consent (without prejudice to its rights of indemnification, if such rights are provided for in this contract) for all use and manufacture, in the performance of this contract or any part hereof or any amendment hereto or any subcontract hereunder (including any lower-tier subcontract, of any patented invention (i) embodied in the structure or composition of any article the delivery of  
46 which is accepted by the Government under this contract, or (ii) utilized in the machinery, tools or methods the use of which necessarily results from compliance by the Contractor or the using subcontractor with (a) specifications or written provisions now or hereafter forming a part of this contract, or (b) specific written instructions given by the Contracting Officer directing the manner of performance.

#### NOTICE AND ASSISTANCE REGARDING PATENT INFRINGEMENT

ARTICLE 34.—(a) The Contractor agrees to report to the Contracting Officer, promptly and in reasonable written detail, each claim of patent infringement based on the performance of this contract and asserted against it, or against any of its subcontractors if it has notice thereof.

(b) In the event of litigation against the Government on account of any claim of infringement arising out of the performance of this contract or out of the use of any supplies furnished or construction work performed hereunder, the Contractor agrees that it will furnish to the Government upon request, all evidence and information in its possession pertaining to the defense of such litigation. Such information shall be furnished at the expense of the Government except in those cases in which the Contractor has agreed to indemnify the Government against the claim being asserted.

#### COMPLIANCE

ARTICLE 35.—The failure of the Government, in any one or more instances, to insist upon strict performance of any of the terms of this contract or to exercise any option herein conferred, shall not

be construed as a waiver or relinquishment for the future of any such terms or options.

#### COMPOSITION OF CONTRACTOR

ARTICLE 36.—If the term "Contractor" as used herein includes more than one legal entity, then each entity so included shall be jointly and severally liable for the undertakings of the Contractor hereunder. Plant or equipment owned directly or indirectly by any one or combination of such entities shall be considered as owned by the Contractor for the purposes of the provisions of this contract.

#### SUPERSEDURE

ARTICLE 37.—If this contract has been preceded by a Letter or Dispatch of Intent or a Notice of Award, anticipating the execution of this contract, then such Letter or Dispatch or Notice and all rights and obligations of the parties thereunder are superseded  
47 and merged into this contract. All acts of the Contractor and the Government and all payments, if any, made by the Government under said Letter or Dispatch or Notice shall be deemed to have been under this contract.

#### DEFINITIONS

ARTICLE 38.—(a) The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Department of the Navy and the head or any assistant head of the executive agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Secretary.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

(c) The term "Officer-in-Charge" as used in this contract shall include the duly appointed successor of such designated officer and likewise any person or persons authorized by notice in writing to the Contractor to act for him or his successor.

#### ALTERATIONS

ARTICLE 39.—The following changes were made in the form text of this contract before the contract was executed by the parties hereto.

(a) Notwithstanding the provisions of Articles 1 and 10, when the amounts payable to the Contractor under this contract (including a fee equitably adjusted pursuant to Article 3) have equaled



the funds appropriated and allotted to this contract, the Contractor shall not be required to continue performance under this contract unless and until this contract is amended to increase the funds appropriated and allotted thereto. Until such amendment, the amounts payable hereunder shall not exceed the funds so appropriated and allotted and the payment of any additional amounts shall be subject to the availability and limitation of appropriations.

(b) Exhibit "A" is attached hereto and made a part hereof.

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## AUTHORITY

ARTICLE 40.—This contract is entered into under authority of Sections 2(c) (10) and 4(b) of Public Law 413, 80th Congress, (Armed Services Procurement Act of 1947), and any required determination and findings with respect thereto have been made.

IN WITNESS WHEREOF, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA,

By (S.) B. O. ROESSLER,

*Civil Engineer Corps, U.S.N., For Chief of  
Bureau of Yards and Docks, Department  
of the Navy.*

CONTRACTOR:

WINSTON BROS. COMPANY,

By (S.) W. J. ROHAN, *President*;

C. F. HAGLIN AND SONS, INC.,

By (S.) C. F. HAGLIN, *President*;

THE MISSOURI VALLEY BRIDGE & IRON CO.,

By (S.) H. S. TULLOCK, *President*;

SOLLITT CONSTRUCTION COMPANY, INC.,

By (S.) A. A. FULLER, *Vice-Pres.*,

*1470 Northwestern Bank Bldg.,*

*Minneapolis 2, Minn.*

(Business address)

The cost of this contract is chargeable to 17X1205, "Public Works (new) Navy", for \$11,000,000; Expenditure Account Class No. 48200.

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## CORPORATE CERTIFICATE

I, F. B. Winston, certify that I am the secretary of the corporation named as Contractor herein; that W. J. Rohan who signed this contract on behalf of the Contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL.]

(S.) F. B. WINSTON.

I, Ada J. Palmer, certify that I am the secretary of the corporation named as Contractor herein; that C. F. Haglin who signed this contract on behalf of the Contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL.]

(S.) ADA J. PALMER.

I, C. F. Greever, certify that I am the secretary of the corporation named as Contractor herein; that H. S. Tullock who signed this contract on behalf of the Contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL.]

(S.) C. F. GREEVER.

I, Aloys A. Goeller, certify that I am the ass't secretary of the corporation named as Contractor herein; that A. A. Fuller who signed this contract on behalf of the Contractor, was then Vice-President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL.]

(S.) ALOYS A. GOELLER.

50	EXHIBIT "A"	
		<i>Per Hour</i>
Air tool op. (jackhammers, vibrator) .....		\$ 1.20
Asbestos Workers .....		2.375
Asbestos Workers Improvers		
1st year .....		1.30
2nd year .....		1.55
3rd year .....		1.65
4th year .....		1.75
Boilermakers .....		2.375
Boilermakers' helpers .....		2.125
Bricklayers .....		2.92
Carpenters .....		1.75
Cement finishers .....		2.00
Electricians .....		2.25
" apprentices		
1st 6 months optional		
2nd " " 40% of journeymen's rate		
3rd " " 45% " " "		
4th " " 50% " " "		
5th " " 55% " " "		
6th " " 60% " " "		
7th " " 65% " " "		
8th " " 75% " " "		

	<i>Per Hour</i>
Glaziers .....	1.625
Iron workers, structural .....	2.125
Iron Workers, ornamental .....	2.125
Iron workers, reinforcing .....	1.875
Laborers, building .....	1.00
Laborers, concrete .....	1.00
Laborers, unskilled .....	1.00
Mason tenders .....	1.25
Mortar mixers .....	1.25
Painters, brush .....	1.625
Painters, spray .....	2.25
Painters, structural steel .....	2.00
Piledrivermen .....	1.75
Plasterers .....	2.50
Plasterers' tenders .....	1.25
Plumbers .....	2.375
Power equipment operators:	
Air compressor, one .....	1.50
"          "          two .....	1.75
Bulldozer .....	2.00
Sideboom .....	2.00
Cranes, derricks, draglines .....	2.25
Carry-alls .....	2.00
Central mixing plants .....	1.75
Distributor (bituminous surfaces) .....	1.75
Ditching machines .....	1.75
Earth drills .....	1.75
51    Elevating grader .....	1.75
Finishing machine .....	1.75
Firemen and oilers .....	1.25
Motor cranes, driver oiler .....	1.50
Hoists, 1 drum .....	1.75
"    2 or more drums .....	2.00
Loading machine .....	1.75
Mixer, mobile .....	1.75
"    smaller than 10-S .....	1.75
"    larger than 10-S .....	2.00
Motor patrols .....	2.00
Pavers .....	2.00
Pumperete .....	1.75
Pumps, smaller than 5" .....	1.50
"    larger than 5" .....	1.75
Push cats .....	1.75
Rollers .....	1.75
"    asphalt .....	1.75
"    sheep foot .....	1.50

	<i>Per Hour</i>
Tournapulls .....	2.125
Scale operators .....	1.50
Shovels .....	2.25
Scrapers .....	2.00
Trenching machines .....	2.00
Well driller .....	1.50
Snatch cat .....	1.50
Roofers, composition .....	1.61
Sheet metal workers .....	1.75
Soft floor layers .....	1.625
Stone masons .....	2.92
Truck drivers:	
Trucks under 1½ tons .....	1.10
Stake body or flat bed .....	1.25
Semi trailer .....	1.40
Dump or batch truck .....	1.40
Winch trucks .....	1.65
Ready mix .....	1.55
Helper or swamper .....	1.15

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## EXHIBIT "C" TO PETITION

THE STATE OF ARKANSAS, BY DEAN R. MORLEY, AS COMMISSIONER OF  
REVENUES, PLAINTIFF

vs.

KERN-LIMERICK, INCORPORATED, DEFENDANT

## ORDER

On this the 24th day of September, 1951, a hearing was held by me at my office in the Capitol Building, in the City of Little Rock, in accordance with the provisions of Act No. 386 of the Acts of 1941, better known as the Arkansas Gross Receipts Act, after due notice was given as provided by said Act, and after hearing the evidence adduced I find that there is due the State of Arkansas the sum of \$342.93 as Gross Receipts tax by the above named defendant for the period beginning December 1, 1950, to December 31, 1950, inclusive.

It is therefore ordered that said delinquent sales tax be collected together with a penalty of None percent of the total amount of said tax, and with interest thereon at the rate of one-half of one percent per month from the date said tax became delinquent, on the 20th day of January, 1951, together with all costs incurred in the collection of said tax, hereafter. The total amount of tax is \$342.93.

Given under my hand as Commissioner of Revenues for the State of Arkansas, on the day and year first above mentioned.

(Signed) D. R. MORLEY,

*Commissioner of Revenues for the State of Arkansas.*

[Title omitted]

RESPONSE TO PETITION—Filed October 25, 1951

Comes, Dean R. Morley, as Commissioner of Revenues for the State of Arkansas, defendant herein, and for his response to the Petition of the plaintiff states:

Admits that the plaintiff is engaged in the general business of selling construction machinery and equipment in this State, and that the defendant is the duly appointed and acting Commissioner of Revenues;

Admits that on November 15, 1950 plaintiff sold and delivered two (2) Allis Chalmers Diesel tractors for the sum of \$17,146.66 but denies that the same were sold to the United States of America f.o.b. Shumaker, Arkansas but states the facts to be that the sale was made to the contractors engaged in the construction of said war plant and that payment therefor was made by said contractors and not by the United States Government;

Defendant further answering denies that said contractors are purchasing agents for the United States of America, but states the facts to be that said contractors are engaged for the purpose of building, constructing and operating certain portions of said war plant and that any purchases made by them are made for the purpose of carrying out their contract with the United States Government in the construction and operation of said plant and that said contractors are consumers under the law of this State and that the attempt by the Agents of the United States Government to designate said contractors as such agents of the United States Government is a subterfuge and intended for the purpose to evade the payment of Gross Receipts Tax due this State;

Admits that the United States of America and "WHMS" refused to pay the amount of tax due on the above described purchases and that on September 11, 1951, the plaintiff filed with the defendant a

Gross Receipts Tax Return showing due thereon the sum of  
54     \$342.93, that the same was filed and paid under protest as provided by law and that a hearing was had before the Commissioner and that the Commissioner issued his written order on September 24, 1951, finding that said tax was due, and that in due time the plaintiff has caused an appeal to be filed to this Court as provided by law and therefore denies each and every other allegation contained and set out in plaintiff's petition.

WHEREFORE, Defendant prays that plaintiff's petition be dismissed and that an Order and Decree of this Court be entered in

favor of the defendant for the payment of said tax together with all costs herein expended and for other proper and equitable relief.

(Signed) O. T. WARD,  
*Attorney for Defendant.*

[File endorsement omitted.]

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## IN THE PULASKI CHANCERY COURT

[Title omitted]

INTERVENING PETITION OF UNITED STATES—Filed April 16, 1952

Petition of The United States for leave to intervene and intervening petition.

The United States of America, by its attorneys, Ellis N. Slack, Acting Assistant Attorney General of the United States, and Berryman Green, Special Assistant to the Attorney General, respectfully alleges that it has a real and substantial interest in the matter in litigation and therefore desires to become a party to the litigation by uniting with the plaintiff in the obtaining of the relief sought in this action for the use and benefit of the United States, and as grounds therefor alleges:

## I

That the intervention for which leave is prayed herein is authorized by the Attorney General of the United States and is at the request of the Department of the Navy.

## II

That the intervenor adopts and incorporates herein by reference all of the allegations and conclusions contained in the plaintiff's petition herein.

## III

That by reason of the facts so alleged, your petitioner has an interest in this cause which it is entitled to protect by intervention herein. Wherefore, your petitioner, United States of America, respectfully prays that leave be granted to it to intervene in this cause; that an order be entered allowing intervention; and that this petition for leave to intervene be considered and adopted by this Court as the intervening petition of the United States.

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Your petitioner further prays that the judgment prayed for by the plaintiff in its petition be entered and that the Court grant such other and further relief as it may deem proper.

UNITED STATES OF AMERICA,

By ELLIS N. SLACK,

*Acting Assistant Attorney General.*

(Signed) BERRYMAN GREEN,

*Special Assistant to the Attorney General.*

APRIL, 1952

[File endorsement omitted.]

## IN THE PULASKI CHANCERY COURT

KERN-LIMERICK, INC., PLAINTIFF

vs.

DEAN R. MORLEY, AS COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS, DEFENDANT, AND THE UNITED STATES OF AMERICA, INTERVENOR

ANSWER TO PETITION FOR INTERVENTION—Filed April 23, 1952

Comes Carl F. Parker, as Commissioner of Revenues for the State of Arkansas, successor to Dean R. Morley, former Commissioner, and for his response and answer to the Petition of Intervenor states:

Denies that the United States of America has any rightful interest in the questions involved herein, and

Denies that it is a proper party to the determination of the questions here involved, and therefore

Denies each and every allegation contained and set out in said Intervention and prays as in the original answer filed herein.

(Signed) O. T. WARD,  
*Attorney for Defendant.*

[File endorsement omitted.]

## IN THE PULASKI CHANCERY COURT

[Title omitted]

## STIPULATION OF FACTS

It is stipulated by Counsel for the parties hereto that the United States of America (hereinafter called the "Government") under authority of Section 2(c)(10) and 4(b) of Public Law 413, 80th Congress (Armed Services Procurement Act of 1947), entered into a contract with Winston Bros. Company, C. F. Haglin and Sons Co., Missouri Valley Constructors, Inc., and Sollitt Construction Company, Inc., (hereinafter called "Prime Contractor") for the construction and/or completion of the Naval Ammunition Depot at Shumaker, Arkansas, which contract is designated Contract No. NOy-23197 and a copy of which contract was attached to the petition filed herein and made an exhibit thereto.

It is further stipulated that the procedure by which a purchase of material and equipment is made in connection with the construction and/or completion of the said Naval Ammunition Depot under the provisions of this said contract is substantially as follows:

1. *Purchase Requests.* All requests for material and equipment to be purchased for use (or for services performed) in connection



with the said construction originate from the Prime Contractor from one of three sources:

a. Engineering Department for basic construction components including equipment for temporary and permanent structures.

b. Field Superintendent for construction equipment, tools and supplies.

c. Department Manager for office supplies and equipment and operating supplies.

59 Such request is made on a form designated "Purchase Request" (NavDocks FC-201). A copy of this form marked Exhibit A is attached hereto.

This form is executed in quadruplicate.

One copy is retained by the department of the Prime Contractor originating the request.

The other three copies are transmitted to the Office Engineer of the Prime Contractor who reviews for adequacy and sufficiency and assigns a serial number and a cost code number. The numbers are inscribed in the blank provided in the upper right hand corner of the form.

The Office Engineer retains one copy.

The remaining two copies are transmitted to the Purchasing Department of the Prime Contractor. The Purchasing Department of the Prime Contractor registers the Purchase Request by the serial number assigned to the request and transmits both copies to the Navy Technical Division, T-100, under the Officer-in-Charge of Construction (hereinafter called O in CC), presently Comdr. G. M. Gans (CEC) USN, acting for the contracting officer as set forth in paragraph 4 hereof. This is the first instance in which the Purchase Request comes to the attention of the Government.

The Navy Technical Division checks the Purchase Request and determines the necessity of the purchase and the conformance of the items requested with required specifications. In the event this Division determines that the request is incorrect or irregular, it so marks the forms and returns them to the Prime Contractor which resubmits the request to the source from which it originated. This Division does in fact on occasion determine a request to be unnecessary and returns it. In the event this Division determines that the items requested do not conform to the required specifications, this determination is noted and the request is returned to the Prime Contractor for its reconsideration. In the event this

60 Division determines that the items requested are necessary and conform to the required specifications, "Approval for Purchase" is noted on the forms for the O in CC and both copies are returned to the Purchasing Department of the Prime Contractor.

2. *Request for Bids.* When the two copies of the Purchase Request are approved and returned by the Navy Technical Division to the Purchasing Department of the Prime Contractor, the Purchasing Department of the Prime Contractor prepares a request for bids on a form designated "Request for Bids" (Form FC-202 (Y&D)). This form is prepared in quadruplicate and carries the serial number assigned to the Purchase Request by the Office Engineer of the Prime Contractor.

The form so prepared describes the items to be purchased and provides blanks for the prices to be quoted therefor. One copy of the form is retained in the Purchasing Department of the Prime Contractor and three copies together with a sheet of standard instructions to bidders are mailed to a suitable list of possible vendors.

A copy of the form "Request for Bids" marked Exhibit B and a copy of the instructions to bidders marked Exhibit B-1 are attached hereto.

The bidder returns a copy of the form completed to show the prices quoted by the bidder.

The bids are opened at the designated time by the Prime Contractor in the presence of two representatives of the O in CC and are initialed by the representative of the Prime Contractor and the two representatives of the O in CC present at the opening of the bids.

For a purchase in an amount less than \$500, bids therefor may be taken by letter or occasionally by telephone, and the only difference in the procedure as heretofore outlined is that such bids are handled directly by the Purchasing Department of the Prime Contractor. The Purchase Request is submitted to and passed upon by the Navy Technical Division as herein described and, except for the manner in which bids are taken, the procedure herein described is otherwise the same as for purchases in amounts more than \$500.00.

61 3. *Bid Comparison Sheet.* All bids received by the Prime Contractor for purchases in connection with the performance of the above mentioned contract are recorded on a form designated "Bid Comparison" (NavDocks FC-203). This procedure is followed whether the bids are taken on the regular form "Request for Bids" or by letter or by telephone. The Bid Comparison Sheet is prepared in duplicate and carries the serial number assigned to the Purchase Request.

A copy of this form is marked Exhibit C and attached hereto.

4. *Purchase.* The representatives of the Prime Contractor and the two representatives of the O in CC recommend the awarding of the contract to the lowest acceptable bidder, and for that pur-

pose a purchase contract is prepared. This purchase order is on a form designated "Purchase Order" (NavDocks FC-204).

A copy of this form marked Exhibit D is attached hereto.

The form bears the serial number previously assigned to the Purchase Request and is made up from the Bid Comparison Sheets. The Purchase Order is executed by the Prime Contractor with the designation that it is the Purchasing Agent for the United States of America and is approved by the O in CC for the Contracting Officer, defined in the Request for Bids to be the Chief of the Bureau of Yards and Docks, Navy Department.

This Purchase Order is prepared in seven copies for ultimate distribution as follows:

1. Original to the vendor.
2. Prime Contractor's Accounting Department.
3. Navy Auditing Division.
4. Purchasing Department of the Prime Contractor.
5. Prime Contractor's material control (Receiving Department).
6. Navy Auditing Division.
7. Purchasing Department of the Prime Contractor.

The original, and the duplicate, triplicate and sixth copies of the purchaser Order, together with the original Bid Comparison, the originals of all bids, and a copy of the Purchase Request, are transmitted to the Navy Technical Division. This Division, acting for the O in CC, examines these instruments to determine that the Purchase Order, the Bid Comparison, and the bids comply with the Purchase Request previously approved by the Division as necessary and in conformity with required specifications.

In the event of any discrepancy or in the event the purchase is found to be unnecessary, or if for any other reason the Purchase Order is disapproved, all instruments are returned to the Prime Contractor.

In the event the Navy Technical Division approves these instruments, all of the said instruments are then transmitted to the Navy Auditing Division which in turn checks all instruments.

At this point of the procedure, there must be funds previously appropriated by the Congress of the United States of America set aside and available for this specific Purchase Order. If such funds have not been appropriated and set aside for this specific Purchase Order, then the Prime Contractor is not required to proceed and does not proceed to consummate the Purchase Order until such funds have been so appropriated and set aside.

After these instruments have been checked and approved by the Navy Auditing Department, it then transmits these same instruments to the O in CC for approval or disapproval. As a gen-

eral rule he does approve; however, he may change, reject, or void the Purchase Order.

When the O in CC has approved the Purchase Order, the Navy Auditing Division retains the triplicate copy of the Purchase Order, the original of all bids, the original Bid Comparison, a copy of the Purchase Request, and the sixth copy of the Purchase Order. It returns the original and a duplicate copy of the Purchase Order only to the Purchasing Department of the Prime Contractor.

Up to this point, the successful bidder has not been notified that his bid has been accepted.

When the Purchasing Department of the Prime Contractor receives the original and duplicate copies of the Purchase Order

fully executed by the Prime Contractor and approved by  
63 the O in CC, the Prime Contractor mails the original Purchase Order to the vendor and retains the duplicate copy in its Accounting Department. At the same time it retains the fifth copy of the Purchase Order in its Receiving Department.

After the Purchasing Department of the Prime Contractor mails the original Purchase Order to the vendor, the fourth copy of the Purchase Order is placed in its "open order" file, together with a copy of all Requests for Bids, a copy of the Bid Comparison Sheet, and the original Purchase Request.

The seventh copy of the Purchase Order is retained by the Purchasing Department and placed in its "commodity classification" file.

5. *Change in Purchase Order.* In the event that it becomes necessary, for any reason, to make a change on a Purchase Order after release to the vendor, such change is made on a form designated "Purchase Change Order" (Form FC-212).

A copy of this form marked Exhibit E is attached hereto.

This Purchase Change Order is originated in the Purchasing Department of the Prime Contractor in the same number of copies as the Purchase Order, carries the serial number assigned to the Purchase Request and is executed, approved, and distributed in the same manner as the Purchase Order itself as heretofore described.

6. *Material Control.* The vendor makes shipment to the O in CC, in care of the Prime Contractor, Shumaker, Arkansas.

The shipment is received at the material receiving station on the grounds of the Naval Ammunition Depot at Shumaker, Arkansas. Upon the arrival of the shipment, notice thereof is given to a representative of the Government designated as a Navy Inspector. No material is received or inspected unless and until a Navy Inspector is present. When a Navy Inspector and a checker for the Prime Contractor are both present, the shipment is checked and the items counted and listed on a form designated as "Receiving and Inspection Report" (NavDocks FC-205).

64 A copy of this form marked Exhibit F is attached hereto.

This form carries the same serial number assigned to the Purchase Request covered by the shipment and is prepared in triplicate. It is prepared on the basis of the joint inspection and count by the Navy Inspector and the checker of the Prime Contractor and is signed by the Prime Contractor's Receiving Clerk and by the Navy Inspector. Any exception to and rejections of material are attested to jointly by the checker for the Prime Contractor and the Navy Inspector.

Distribution of this instrument is as follows:

1. The original goes to the Navy Auditing Division.
2. The duplicate goes to the Accounting Department of the Prime Contractor.
3. The triplicate copy goes to the Receiving Department of the Prime Contractor.

In the event that any material is rejected after inspection and count by the Navy Inspector and the checker for the Prime Contractor, the material so rejected is listed on a form designated "Material Rejection Report" (form FC-208 (Y&D)).

A copy of this form marked Exhibit G is attached hereto.

This Material Rejection Report carries the serial number assigned to the Purchasing Request covered by the shipment and is signed jointly by the Navy Inspector and the Materials Clerk of the Prime Contractor and is executed in quadruplicate.

Distribution, in lieu of that appearing on the form which to that extent has been changed, is as follows:

1. The original goes to the Navy Auditing Division.
2. The duplicate copy goes to the Accounting Department of the Prime Contractor.
3. The triplicate copy goes to the Purchasing Department of the Prime Contractor.
4. The fourth copy is placed in the receiving file of the Prime Contractor.

65 If the item purchased is equipment, the procedure is essentially the same as that described above. All equipment is subject to inspection by the Navy Inspector of the Equipment Division, and the acceptance or rejection of the equipment is subject to a joint check by the Prime Contractor and the Navy Inspector. Receipt of equipment is noted on a form designated "Individual Equipment Receiving and Inspection Report" (NavDocks FC-501).

A copy of the form marked Exhibit H is attached hereto.

This form carries the same serial number assigned to the Purchase Request covered by the shipment and is signed by the Receiving Clerk of the Prime Contractor and the Navy Inspector and is dis-

tributed as designated on the form. If equipment is rejected, such rejection is noted by the preparation and signing of a Material Rejection Report in the same manner as above described.

7. *Accounting.* The vendor's invoice is submitted to the Accounting Department of the Prime Contractor. There the invoice is matched with a duplicate Receiving and Inspection Report signed by a Navy Inspector and the Prime Contractor's Receiving Clerk. The invoice and the duplicate Receiving and Inspection Report are then matched with the duplicate Purchase Order (and duplicate Purchase Change Order where applicable.)

If the invoice covers equipment, the invoice is matched with a duplicate Individual Equipment Receiving and Inspection Report and duplicate Purchase Order (and duplicate Purchase Change Order where applicable).

The vendor's invoice is then audited with the Purchase Order (and Purchase Change Order where applicable), the duplicate Receiving and Inspection Report, and duplicate Individual Equipment Receiving and Inspection Report, where applicable, inclusive of but not limited to the following items:

1. Item numbers.
2. Description of items.
3. Quantities.
- 66 4. Units.
5. Unit Prices.
6. Amount.
7. Discount terms.
8. Shipping f.o.b. terms.
9. Deletion of taxes imposed by the state or political subdivisions thereof.

After the vendor's invoice has been audited in this manner, then the invoice, freight bills, and delivery tickets are attached to an Accounts Payable Voucher.

A copy of this form (NavDocks FC-403) marked Exhibit I is attached hereto.

The form is completed, executed and distributed as indicated.

When the vendor's invoice has been checked and the Accounts Payable Voucher has been prepared and checked, the Voucher is approved by the Chief Accountant or delegated Chief Auditor of the Prime Contractor.

When the Accounts Payable Voucher has been approved by the Chief Accountant of the Prime Contractor, it is transmitted to the Disbursing Agent of the Prime Contractor who in turn draws a check on the disbursing account. This disbursing account is a fund provided and maintained by the Prime Contractor. The check is signed by the Chief Accountant and countersigned by the Controller for the Prime Contractor and then mailed to the vendor.

The cancelled check is then returned by the vendor's bank to the Accounting Department of the Prime Contractor. The stub receipt form attached to the check signed by the vendor is detached from the check, and the original vendor's invoice covered by the signed stub receipt and the stub receipt are stapled together and posted in triplicate on a Transmitted Summary.

A copy of this form (NavDocks FC-411) marked Exhibit J is attached hereto.

67 The accounting thus far has been done solely by the Prime Contractor.

The original and duplicate copies of the Transmittal Summary and attachments consisting of vendor's original invoice and signed stub receipt are then transmitted to the Navy Auditing Division for approval of reimbursement.

The Navy Auditor audits the Transmittal Summary by referring to original copies of all bids, original Bid Comparison, the triplicate copy of the Purchase Order, and original Receiving and Inspection Report and original Individual Equipment Receiving and Inspection Report where applicable, covering each invoice listed on the Transmittal Summary. If he finds the Transmittal Summary in order, the Navy Auditor stamps the duplicate copy as "Approved" for the O in CC to indicate that the items listed thereon are approved for government reimbursement to the Prime Contractor and returns this duplicate to the Prime Contractor.

Government Form 1034 Reimbursement Voucher is then prepared by the Navy Auditing Division for certification by the Prime Contractor for approval by the O in CC under Contract No. NOy-23197, which approval is indicated by his signature thereon. This instrument is then mailed to the Navy Regional Accounts Officer at the Great Lakes Naval Station.

The Navy Regional Accounts Officer then draws a check on the Treasury of the United States of America against the funds allocated for Contract No. NOy-23197 for the Prime Contractor and forwards said check to the Prime Contractor's bank for deposit to its account.

8. *Cost-Plus-a-Fixed-Fee Sub-Contractors.* The procedure and forms for purchases made through the Cost-Plus-A-Fixed-Fee Sub-Contractors are identical with the procedure and forms as thus described, except that the purchase orders of these sub-contractors are transmitted through the office of the Purchasing Department 68-69 of the Prime Contractor for its preliminary approval to the O in CC for approval instead of being transmitted directly to the O in CC. These cost-plus-a-fixed-fee sub-contractors are C. Wallace Plumbing Company and Fischbach & Moore of Texas, Inc.

It is further stipulated that Exhibit K, attached hereto, is a chart which shows graphically the procedure as herein described.



It is further stipulated that Exhibit L, attached hereto, is a photostatic record of the actual transaction in issue.

It is further stipulated that the general procedure hereinabove described is required by the Government and the several forms in connection therewith are prepared by the Government and their use is mandatory.

It is further stipulated that the exhibits marked Exhibits M and N, respectively, attached hereto, are true and correct copies of contracts between the Prime Contractor and Cost-Plus-A-Fixed-Fee Sub-Contractors, C. Wallace Plumbing Company and Fischbach & Moore of Texas, Inc.

(Here follow 2 photos, fols. 70, 71-73)

Form 20  
(Rev)

REQU

TO

PLEASE  
DEL  
NO CHA  
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IF UNAB

ITEM

TERMS  
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(Y&D)  
15)  
**ET FOR BID**

**BUREAU OF YARDS AND DOCKS  
NAVY DEPARTMENT**  
**BY: WINSTON BROS. COMPANY**  
**C. F. HAGLIS AND SONS CO.**  
**MISSOURI VALLEY CONSTRUCTORS, INC.**  
**BOLLITT CONSTRUCTION COMPANY, INC.**  
**PURCHASING AGENT**  
**F. O. Box 5471**  
**Camden Ark**  
**CONTRACT NOY 23197**

DA. —

RETURN TO PURCHASING DEPT.

**ATTENTION**

NOTES HEREIN, SUBJECT TO CONDITIONS ON REVERSE SIDE, YOUR LOWEST PRICE FOR THE FOLLOWING MATERIAL TO BE  
 BY F. O. B. \_\_\_\_\_  
 FOR PACKING OR DRAYAGE OR FOR ANY OTHER PURPOSE WILL BE ALLOWED OVER AND ABOVE THE PRICE QUOTED ON  
 NET.  
 IT IS RESERVED TO ACCEPT OR REJECT QUOTATION ON EACH ITEM SEPARATELY OR AS A WHOLE.  
 TO BID, PLEASE RETURN THIS REQUEST WITH REASON STATED HEREON.

(SIGNATURE OF PURCHASING AGENT)

DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	AMOUNT
TOTAL AMOUNT OF FREIGHT INCLUDED IN ABOVE \$ _____ (TO BE USED AS DEDUCTION FROM YOUR INVOICE IN EVENT "SHIPMENT COLLECT ON GOVERNMENT B/L" IS SPECIFIED IN OUR PURCHASE ORDER)				TOTAL

THIS IS NOT AN ORDER

# THIS IS NOT AN ORDER

TOTAL AMOUNT OF PRIZE(s) INCLUDED IN ABOVE: \$ (TO BE USED AS DEDUCTION FROM YOUR INVOICE)  
IN EVENT "SHIPMENT COLLECT BY GOVERNMENT B/L" IS SPECIFIED IN OUR PURCHASE ORDER)

SIGNED \_\_\_\_\_  
BY \_\_\_\_\_  
DATE \_\_\_\_\_

70

## GENERAL PROVISIONS

1. The prime Contractor under the NOY contract referred to on the face of this order as Purchasing Agent is hereinafter referred to as the "Contractor". The United States of America is hereinafter referred to as the "Government". The term "Secretary of the Navy" includes his duly authorized representatives. The term "Contracting Officer" refers to the Chief of the Bureau of Yards and Docks, Navy Department, and includes his duly authorized representatives. The term "Vendor" refers to the individual, company or corporation named on the face of this order.
2. Vendor shall acknowledge this order promptly and such acknowledgment shall be deemed an acceptance of all the terms and conditions hereof. Vendor shall notify Contractor promptly if shipment will not be made by the date specified.
3. This purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price, but the Contractor shall handle all payments hereunder on behalf of the Government. The vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor. Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor shall not acquire title to any thereof.
4. Vendor shall make shipment on Government bills of lading or by prepaid or collect commercial bills of lading as elected by the Contractor and stated on the face of this order or subsequently communicated to Vendor.
5. No substitution or changes are to be made by the Vendor in this order without express written authority from the Contractor. The Government (acting through the Contractor or otherwise) may from time to time by written order to the Vendor make changes in the specifications for articles ordered, or the quantities, method, time, or rate of shipment of the same, provided, however, that an equitable adjustment shall be made (by agreement between the Contracting Officer and the Vendor) in the purchase price and other pertinent terms of this order to reflect the effect, if any, of such ordered change on the Vendor's cost of performance hereunder. Claim by Vendor, for any such adjustment shall be deemed waived unless made in writing within 30 days after receipt of the order for the change. Immediate effect shall be given to the ordered change, any dispute as to such equitable adjustment being determined as a question of fact under the "Disputes" clause, paragraph 9 of these General Provisions.
6. Vendor shall not assign this order or any monies due or to become due hereunder without the Contractor's prior written consent.
7. No taxes imposed by any state or political subdivisions thereof on the sale of articles covered by this purchase order are included in the prices stated herein. The prices stated herein do include all applicable Federal Excise Taxes.
8. Vendor guarantees that at the time of delivery thereof the articles provided for under this order will be free from any defects in material or workmanship and will conform to the requirements of this order. Notice of any such defect or nonconformance shall be given to the Vendor within one year of the delivery of the defective or nonconforming article. If required by the Government within a reasonable time after such notice, the Vendor shall promptly correct or replace the defective or nonconforming article or part thereof. If the Government does not require correction or replacement, the Vendor, if required by the Government within a reasonable time after the notice of defect or nonconformance, shall repay such portion of the price of the article as is equitable in the circumstances.
9. Except as otherwise specifically provided in this order, all disputes concerning questions of fact arising under this order shall be decided by the Contracting Officer, whose decision shall be final and conclusive. Pending decision, the Vendor shall diligently proceed with performance.
10. There are incorporated herein by reference (with appropriate substitution therein of "Vendor" for "Contractor"): (a) the "Uniform Termination Article for Fixed Price Supply Contracts" and the "Contract Article for Termination for Default" prescribed by the Secretary of the Navy as Enclosures (A) (NPD Par 11.305) and (A-13) (NPD Par 11.311) respectively to his Contract Termination directive No. 1, dated February 26, 1944 and his directive dated January 25, 1946; and (b) the standard patent article prescribed by the Secretary of the Navy in Par 4 of his directive dated October 25, 1945, relating to the patent matters (NPD Par 11.842a). The Vendor shall reserve in all subcontracts or orders relating to this purchase order the right to terminate or cancel such sub contracts or orders upon termination of this purchase order in whole or in part at the option of the Government pursuant to the "Uniform Termination Article for Fixed Price Supply Contracts". Whether or not such right to terminate or cancel such subcontracts or orders upon termination of this for costs arising out of subcontracts or orders relating to the purchase order shall be limited to costs allocable to this purchase order, and shall not include anticipatory profits or other damages resulting from the termination or cancellation of such subcontracts or orders.
11. There are incorporated herein by reference (with appropriate substitution therein of "Vendor" for "Contractor"), the following entitled standard clauses prescribed by the Secretary of the Navy for inclusion in the general provisions in all fixed price supply contracts by his directive dated January 25, 1946: (a) "Inspection" (NPD Par 11.335a); (b) "Responsibility for Articles Furnished" (NPD Par 11.335a); (c) "Waish-Healey Act" (NPD Par 11.371a); (d) "Overtime Compensation of Laborers and Mechanics" (NPD Par 11.335a); (e) "Non-discrimination in Employment" (NPD Par 11.343a); (f) "Officials Not to Benefit" (NPD Par 11.343a); (g) "Covenant against Contingent Fees" (NPD Par 11.376a).
12. If the Vendor is required to pay any taxes which by the terms of this order are excluded from the stated price, then the amount of the payment so made shall be added to the stated price, provided, however, that no such taxes shall be paid without first bringing the matter to the attention of the Contracting Officer, and that the directions given by the Contracting Officer with respect to payment of such taxes and action to be taken regarding refund thereof (any refund to inure to the benefit of the Government) shall be strictly followed.
13. Copies of the provisions incorporated by reference under paragraphs 10 and 11 may be obtained from the Contractor.

## BILLING INSTRUCTIONS

14. The following certificate must appear on both original and duplicate copy of your invoice and be dated and signed in full, in ink by a person authorized to act for you. The title of the certifying officer must be indicated:

"I certify that the above bill is correct and just; that payment therefor has not been received; that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transactions have been complied with; and that the State or local sales taxes are not included in the amounts billed."

By \_\_\_\_\_

Date \_\_\_\_\_ Title \_\_\_\_\_

In the event the Contractor is required to pay and does pay State or local sales taxes, the words "and that State or local sales taxes are not included in the amounts billed" should be struck from the certification and the following additional certification added:

"The amount of State or local sales, use, occupational, gross receipts, or other similar taxes or license fees imposed on the Vendor or Vendee by reason of this transaction is \$\_\_\_\_\_. The Vendor, or Vendee, as the case may be, agrees upon direction of the United States to make appropriate claim for refund and in the event of any refund, to pay the amount thereof to the United States."

## 15. RENEGOTIATION

- (a) This contract is subject to the Renegotiation Act of 1948.
- (b) The Contractor (which terms as used in this clause means the party contracting to furnish the articles or perform the work required by this contract) agrees, within thirty days after receipt of its signed copy of this contract, to notify the Military Renegotiation Policy and Review Board, Office of the Secretary of Defense, Washington 25, D. C., of such contract, indicating its own name and address, provided that, if the Contractor has previously reported to the Military Renegotiation Policy and Review Board any contract or purchase order subject to the Renegotiation Act of 1948, such notification shall not be necessary.
- (c) The Contractor agrees to insert the provisions of this clause, including this paragraph (c), in all contracts or purchase orders in excess of \$1,000 to make or furnish any article or to perform all or any part of the work required for the performance of this Contract; provided, that the Contractor shall not be required to insert the provisions of this clause in any Contract or purchase order of a class or type described in subsection (1) (1) of the Renegotiation Act of February 25, 1948, as amended, or any Contract or purchase order of a class or type which has been exempted by the Secretary of Defense or by the Military Renegotiation Policy and Review Board.

74-204

## EXHIBIT B-1 TO STIPULATION

## INSTRUCTIONS TO BIDDERS

1. Use the forms provided, showing unit prices, extension thereon, and total. In case of error in extension, unit price shall govern.

2. Where applicable, indicate brand, make, model, size, etc., of item on which you are bidding.

3. Return the *white* and *pink* copies, both identically filled out.

4. Use the return envelope provided.

5. Use the typewriter or ink in filling out bid forms.

6. Sign the white and pink copies in ink, including company name and signature of an authorized person, with title designated.

7. If additional sheets are required, or a cover letter is written, they must be in *duplicate*, both copies signed and identified by bid number.

8. If a larger envelope is required, paste the regular envelope on it for address and identification.

9. If corrections are made, they must be initialed by person signing bid.

10. Do not neglect to show terms, delivery and date through which bid is to stand for acceptance.

11. If f.o.b. point is not indicated by us, be sure to note change.

12. Do not neglect to show amount of freight included.

13. Be sure you have read conditions at the head of this form and those on reverse hereof.

14. Mail bid in time to reach us on date indicated as one on which prices must be in our hands.

Failure to adhere to these instructions may constitute an informality in the bid.

205

IN THE PULASKI CHANCERY COURT

92958

KERN-LIMERICK, INC., PLAINTIFF

v.

DEAN R. MORLEY, COMMISSIONER OF REVENUES FOR THE STATE OF  
ARKANSAS, DEFENDANT

THE UNITED STATES OF AMERICA, INTERVENOR

## DECREE

On this day appeared the plaintiff, Kern-Limerick, Inc., by its Solicitors, Rose, Meek, House, Barron & Naxh, the defendant, Carl

F. Parker, Commissioner of Revenues for the State of Arkansas, by its Solicitor, O. T. Ward, and the Intervenor, United States of America, by its Solicitor, Berryman Green, and upon a showing that Dean R. Morley is no longer the Commissioner of Revenues for the State of Arkansas and oral motion of O. T. Ward, the cause of action is hereby revived in the name of and against Carl F. Parker, presently the Commissioner of Revenues for the State of Arkansas and successor to Dean R. Morley; and all parties hereto announcing ready for trial, this cause is submitted to the Court upon the petition of Kern-Limerick, Inc., with its exhibits, the response of the defendant thereto, the intervening petition of the United States of America, the answer of the defendant thereto, stipulation of counsel with its exhibits filed herein, and argument of counsel; and the Court being well and sufficiently advised as to all matters of fact and law arising herein, doth find that on December 14, 1950, the plaintiff sold and delivered to the United States of America, f.o.b. Shumaker, Arkansas, two (2) Allis-Chalmers HD-50 Diesel tractors for \$8,573.33 each, or for a total price of \$17,146.66; that the sale was made upon the purchase order of the Navy Department, Bureau of Yards and Docks, by Winston Bros. Company, C. F. Haglin and Sons Co., The Missouri Valley Constructors, Inc., and Sollitt Construction Company, Inc., as the purchasing agent for the United States of America, and under their contract with the United States of America, designated as NOy-23197; that the United States of America and Winston Bros. Company, C. F. Haglin and Sons Co., The Missouri Valley Constructors, Inc., and Sollitt Construction Company, Inc., refused to pay on the said transaction any  
206 tax as a gross receipts tax due under The Arkansas Gross Receipts Act of 1941; that on the 11th day of September, 1951, plaintiff filed with the defendant a gross receipts tax return covering the said transaction and tendered under protest the sum of \$342.93 demanded and claimed by the defendant to be due as a gross receipts tax on the said transaction; that with the said tender plaintiff made demand in writing for a refund of the said payment and requested the defendant to grant a hearing to determine whether the said transaction is taxable under the provisions of The Arkansas Gross Receipts Act of 1941; that the defendant granted plaintiff's request and held said hearing on the 24th day of September, 1951; that upon said hearing the defendant issued an order finding that the said transaction is taxable and the tax due under the provisions of the said The Arkansas Gross Receipts Act of 1941, but further finding that no penalty should be assessed on account of said tax; that the plaintiff within proper time filed its petition for a refund; and that the United States of America properly intervened herein and is a proper party to this action.

The Court doth further find that the said sale by the plaintiff is a

sale to the United States Government and is exempt from taxation under the provisions of The Gross Receipts Act of 1941; that the imposition of the gross receipts tax upon said sale is repugnant to the Constitution of the United States of America in that it violates the immunity of the United States of America from taxation by states or political subdivisions thereof; and that by imposing a gross receipts tax upon the said transaction the defendant has construed and applied The Arkansas Gross Receipts Act of 1941 in a manner which renders that statute invalid under the Constitution of the United States of America.

It is, therefore, by the Court considered, ordered, adjudged and decreed that the plaintiff recover from the defendant the sum of \$342.93, together with its costs herein expended.

207 The defendant objects to the findings of the Court and its order granting relief to the plaintiff, and prays an appeal, which appeal is hereby granted.

This order having been granted on the 23rd day of April, 1952, but omitted from the record, is ordered to be entered now for them. May 14, 1952.

208 Clerk's Certificate to foregoing transcript omitted in printing.

209 IN SUPREME COURT OF ARKANSAS

OPINION—Filed May 21, 1953

The United States of America, through and on behalf of the Navy Department, entered into a written contract (designated as NOY-23197) with Winston Bros. Company, C. F. Haglin and Sons Company, Missouri Valley Contractors, Inc., and Sollitt Construction Company, Inc. (hereinafter referred to as WHMS) to construct a Naval Ammunition Depot at Shumaker, Arkansas, the total cost of which was approximated at \$30,800,000.00. By the terms of the contract of employment WHMS was to procure all labor, supplies, materials, etc., necessary for constructing and equipping said depot and pay for the same, and the Government was to reimburse WHMS for all such expenditures and pay them, in addition, the sum of \$580,000.00 for their services as contractors. The type of contract referred to is designated and is generally known as a "Cost-Plus-a-Fixed-Fee Contract." Other provisions of the contract will be specifically mentioned later.

The question herein to be decided arose in the manner presently set forth. On December 14, 1950 Kern-Limerick, Inc., a machinery and equipment company of Little Rock, Arkansas, sold to WHMS (as contended by appellant) or to the United States (as contended by the latter) two diesel tractors for a total price of \$17,146.66, and

the tractors were delivered at the site of construction at Shumaker, Arkansas. The Revenue Commissioner for the State of Arkansas demanded payment from Kern-Limerick, Inc. in the sum of \$342.93 as a 2% tax on the sale price pursuant to the provisions of the Arkansas Gross Receipts Act of 1941. Payment of the tax was made under protest by Kern-Limerick, Inc., and later suit was filed in the Chancery Court of Pulaski County, Arkansas for the recovery of the amount so paid. The United States intervened in this suit, contending that the sale in question was a sale to it and that consequently no tax was collectible thereon by the State of Arkansas. The Chancery Court held with the contention of the United States and the Commissioner of Revenues for the State of Arkansas has appealed to this Court for a reversal.

The 1941 Gross Receipts Act, referred to before, provides that no tax shall be paid on sales to the United States; therefore, the question confronting this Court is whether the sale in question was made to WHMS or to the United States. To answer this question it is necessary to examine the provisions of the contract between WHMS and the United States and to do so in the light of court decisions relating thereto.

In order to obtain the savings in money and time that may reasonably be expected by the negotiation of a cost-plus contract such as the one here involved, it is obvious that the U. S. Government must maintain, and so the contract must provide, effective control over all purchases by the contractor; otherwise, the Government could not be assured it would receive standard materials and services at the lowest possible prices. Therefore, as would be expected, the United States in this case wrote into its contract with WHMS provisions for strict control of all purchases of labor, materials, and equipment which were to be used in or for the construction of the Ammunition Depot.

*Contract.* Some of the pertinent provisions were: (a) All applications for purchases, all bids, and all purchases must be made on Government (Navy) forms and all must be approved by an Officer in Charge who was an officer representing the Navy Department; (b) After approval WHMS consummated the transaction by paying the purchase price and taking delivery at the site of construction at Shumaker, Arkansas; (c) Upon presentation of the evidences of purchase and upon a showing that all requirements had been complied with, the purchase price paid, and delivery made, the Government would reimburse WHMS. Before reimbursement it must also appear that the Government had appropriated money for that purpose; (d) Title to the property so purchased never vested in WHMS but did vest in the United States; (e) WHMS was acting as purchasing agent for the United States in negotiating all purchases; (f) The United States was obligated to the vendor to pay the purchase



price; and (g) The vendor was to make demand for payment  
211 by submitting an invoice to WHMS.

Some of the terms of the contract, including those designated (e), (f) and (g) above, were printed on the back of all "Request for Bids" and "Purchase Order" blanks which went to prospective vendors.

*Arkansas Statute.* That tax sought to be imposed herein by the Arkansas Revenue Commissioner is levied by Act No. 386 of 1941, which specifies a tax of 2% (*Ark. Stats. 84-1903*) upon the gross proceeds derived from all sales, and requires the vendor (*Ark. Stats. 84-1908*) to pay the tax to the Commissioner. Some other pertinent provisions of said Act No. 386 are set out below.

(1) *Ark. Stats. 84-1902 (e)* :

Sale: The term 'sale' is hereby declared to mean the transfer of either the title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished.

(2) *Ark. Stats. 84-1902 (i)* :

Consumer-User: The term 'consumer' or 'user' means the person to whom the taxable sale is made, or to whom taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies and equipment used or consumed by them in performing any contract and the sales of all such property to contractors are taxable sales within the meaning of this Act.

(3) *Ark. Stats. 84-1903 (e)*—last paragraph:

Sales of service and tangible personal property including materials, supplies and equipment made to contractors who use same in the performance of any contract are hereby declared to be sales to consumers or users and not sales for resale.

As has been previously stated, the vital question is: Who was the "purchaser" in this instance? Was it WHMS or the United States? It is conceded that if it was the former the tax is collectible, and if it was the latter the tax is not collectible. The opinion of the United States Supreme Court in the case of *Alabama v. King and Boozer* (which will be cited later), in which this same question was under consideration, contains this language: "Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority." Giving a reason-

able interpretation to the language of the Arkansas Gross Receipts Act as it is set out in sub-paragraphs above (1) defining a Sale, (2) defining Consumer-User, and (3) relating to contractors, and having in mind all the provisions of the contract between WHMS and the United States, we are of the opinion that WHMS was the "purchaser" in this instance and that consequently Kern-Limerick, Inc. is liable to the Commissioner for the tax on the two tractors which it sold.

Notwithstanding the above, however, it is obvious that the State of Arkansas could not arbitrarily define WHMS as the "purchaser" and thereby impose a tax on the United States Government if in fact and in truth the latter was the purchaser in this instance, and so we will proceed to consider the question from that standpoint after making this further observation. In determining whether or not the State of Arkansas has acted arbitrarily in enacting this particular Act with the language it contains depends on whether the Act is discriminatory, and, particularly, in this instance, whether it discriminates against the United States. The opinion referred to above recognizes this test and makes it clear that the mere fact that the tax is eventually passed on to the Federal Government is no indication it is discriminatory or that it violates the immunity of the Government. In our opinion the Arkansas Statute meets all the tests.

*Was the United States the Purchaser?* In coming to the conclusion that the United States was not, in this instance, the "purchaser", we base our decision primarily on the opinion in the case of *Alabama v. King and Boozer*, 314 U.S. 1, decided in 1941. The question for decision in that case was the same as presented here and was based on facts, with the exceptions later noted, very similar to the facts of this case. The opinion which overruled some former decisions and approved others is comprehensive and logical and appears to be a landmark case on the issue involved. It upheld the imposition of a sales tax by an Alabama Statute on the sale of lumber by King and Boozer to a cost-plus-a-fixed-fee contractor who was engaged in constructing a project for the Government pursuant to a contract presently to be mentioned.

213 For the sake of brevity it suffices for this opinion to say that the Government contract in the *King and Boozer* case was like the contract here with the same provisions and regulations except three on which the intervenor relies to distinguish the two cases. The three exceptions referred to are: (a) In the cited case the contractor was liable to the vendor for the purchase price while here the contract provides the Government shall be liable; (b) Here the contract designates the contractor (WHMS) as Purchasing Agent for the Government, while in the cited case no such provision appears in the contract; and (c) Here the contract provides that title

to any purchased article vests immediately in the Government while in the cited case it vested in the Government upon delivery at the site of construction and approval by the Government.

It is our judgment that the distinguishing features set out above are more synthetic than real and that they do not justify a conclusion here different from that reached in the *King and Boozer* opinion.

(a) Appellees lay great stress on the fact that here the Government has obligated itself to pay the vendor and that this indicates the Government was the real purchaser, and say that this feature, which was lacking in the *King and Boozer* case, was a necessary element to sustain the opinion. The cited opinion does contain this phrase: "It is equally plain that they (the contractors) did not assume to bind the Government to pay for the lumber . . ." We are not convinced that the court attached the same importance to this feature as appellees do, but we are convinced that there is actually no real difference. Under the terms of the contract here it is hard to see how the credit of the Government could be pledged to the vendor. In the process of buying the tractors the Government (through the Navy Officer in Charge) checked every step in detail. When the sale was finally made the tractors were paid for by WHMS, delivered to the site of construction, and again checked and inspected by the agent. Only then and after WHMS proved to the Government's satisfaction that the purchase price had been paid by WHMS to Kern-Limerick, Inc., did the Government reimburse WHMS. We are convinced that this provision pledging the credit of the Government was not placed in the contract because of any necessity to further protect the interest of the Government, but for another purpose, and maybe considered redundant. We understand appellees do not seriously deny this provision was inserted to avoid the effect of the decision in the *King and Boozer* case. Granting the propriety of such purpose, we do not think it effective.

(b) *WHMS as Purchasing Agent*. Much of what was said above applies to this provision of the contract and especially as to the possible purpose of its insertion. Actually, the contractor in the *King and Boozer* case acted as effectively as an agent for the Government as WHMS does under the contract in this case. However, in neither case do we deem it proper to speak of the contractor as an "agent" because in each instance he was a contractor (an independent contractor) and was so designated in the contract of employment. Whether WHMS could be legally made an agent for the purpose of making purchases for the Government in this instance will be later discussed.

(c) *Title in the Government*. The fact that under the terms of the contract title to the tractors never rested in WHMS also, as we

view the entire case, fails to distinguish this case from the *King and Boozer* case. There the title to the lumber rested in the contractor only until the lumber was delivered and paid for and then title automatically vested in the Government. The practical result was the same in both instances and we are unwilling to say that the legal fiction of divesting WHMS of title momentarily here has any significant bearing on the immunity of the United States from taxation. By no process of reasoning can we see how such a provision was necessary to better protect the interest of the Government, and we again conclude it must have been devised for another purpose.

Before the decision in the *King and Boozer* case Congress had refused to exempt from taxation purchases made by cost-plus contractors in constructing projects for the Government. Since the decision an attempt to evade its effect was made by proposed legislation in the Congress, but, after exhaustive hearings, Congress refused to sanction such enactment. In view of this definite attitude on the part of the Government itself, we think any attempt to reach a different result by skillful legal phraseology should be cautiously considered. We recognize the supremacy of the Government in the field of taxation and the urgency of the need for funds by both the State and Federal Governments, but where the interests of the two conflict, it is necessary to have a division line with due respect for both. This idea is well expressed, in the opinion referred to, in this language:

So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties.

*Armed Services Procurement Act of 1947.* This Act of Congress will be referred to by sections as it appears in *USCA.*, Volume 41, page 189, Title 41, beginning with Section 151. In some way, appellees urge, this Act strengthens their contention that the United States was the actual purchaser in this instance. Their theory seems to be that the Act gives direct authority to the Navy Department to make purchases for its own use and purposes, that this authority can be delegated to an agent, and that such delegation was made in this instance to WHMS. We do not agree with this interpretation of the Act.

As we see it, the over-all purpose of this Procurement Act was to empower the Navy Department (as well as the Army, Air Force and Coast Guard) to purchase (or contract to purchase) supplies or services for its own use, as stated in Section 151. Considering, without holding, the Act authorized the Navy Department to buy an Ammunition Dump at Shumaker, Arkansas (had one been in

existence) for its use, it does not follow that the Navy Department was authorized to buy nails, lumber, cement, tractors, etc., which were not to be used by the Navy but by WHMS (in this instance) to construct, as independent contractors, the Ammunition Dump.

*Delegation of Agency.* Appellant takes the position that even if the Navy Department had the authority to make the purchase of the tractors here, it does not have the power under the Act to delegate this power to WHMS in this instance, and we agree with this view.

216 Section 156 reads as follows:

§ 156. *Determinations and decisions—(a) Powers of agency head; finality; delegation*

The determinations and decisions provided in this chapter to be made by the agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this chapter, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

*Non-delegable powers; delegation to chief procurement officer only*

(b) The power of the agency head to make the determination or decisions specified in paragraphs (12)-(16) of section 151 (c) of this title and in section 154(a) of this title shall not be delegable, and the power to make the determination or decisions specified in paragraph (11) of Section 151(c) of this title shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than \$25,000.

From the above we conclude that if the power in this instance was delegable at all, it would be only to an officer or official of the Navy. Here the attempt was to delegate the power to WHMS. It appears probable to us that the purchases here were to be made under paragraphs (12)-(16) of section 151(c), in which case there was no power to delegate, rather than under paragraph (10) as contended by appellees. Paragraph (10) designates "supplies and services for which it is impracticable to secure competition."

Appellees also contend that section 153(b) provides the authority for the execution of the contract under consideration. We think they would be right if the purpose of the contract with WHMS had been to buy and accumulate (for the future use of Navy Depart-

ment) materials, as contended by appellees, is repugnant to the over-all content and purpose of the contract. Not only are the contractors designated and treated as such in the contract but obviously the only purpose of the contract was to obtain the experience, skill and knowledge necessary to assemble proper materials and services and fashion them into an ammunition depot in the most efficient manner. If the United States had only been interested in obtaining the services of a purchasing agent to buy materials it could, no doubt, have selected a competent Naval Officer at no extra cost to perform that function and, in all events, it could have surely secured the services of such an agent for considerable less than half a million dollars.

Reversed.

Holt and Robinson, JJ., dissent.

George Rose Smith, J., not participating.

ROBINSON, *Justice* (dissenting):

No one will contend that if the Government is a *bona fide* purchaser of equipment, a state sales tax should be collected. If the Government is not the purchaser in this instance, it is hard to imagine a situation where it is ever the purchaser. The Government is invisible and intangible and must, necessarily, act through agents and has the exclusive right to appoint its own agent, or agents. Certainly no state has the power to say who can, or who cannot, act as agent for the Government. Moreover, the Government, through its duly appointed agents, has the right, in fact it is the duty of such agents, to avoid incurring unnecessary expenses, including taxes.

The majority opinion is based principally on *Alabama v. King & Boozer*, 341 U.S.1, 62 S. Ct. 43, 46, 86 L. Ed. 3. An attempt is made to show that there is no real distinction between that case and the case at bar, but, in my opinion, the facts in the two cases are altogether different. None of the facts on which the court based the opinion in the *King & Boozer* case are present in this case.

In the *King & Boozer* case the court said: "As the sale of the lumber by King and Boozer was not for cash the precise question is whether the Government became obligated to pay for the lumber and so was the purchaser whom the statute taxes". Then the court pointed out the following facts upon which it based the opinion that the Government was not the purchaser:

(1) The contractor was required to make all such contracts in his own name, and on his own credit, and not bind or purport to bind the Government or the contracting officer.

(2) The Government was not to be bound by the purchase contract.

(3) The purchase order stated that the purchase did not bind or purport to bind the United States Government or Government officers.

218 (4) The Government's credit was not pledged and the court said: "We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price".

The facts in the present case which distinguish it from those set forth above are as follows:

(1) The Government was bound to pay for the equipment.

(2) The equipment was not bought in the name of the contractor or on the the contractor's credit.

(3) The Government's credit was pledged.

(4) The request for bids provides that the contractor shall not acquire title to any of the property purchased.

If the contractor had attempted to divert to his own use property purchased for this Government job, there is no court in the land that would not have enjoined such diversion, upon a showing of the facts in the case. This is true because the contractor had acquired possession of the property as agent of the Government. At no time did the contractor own the property, nor was the contractor liable for the payment of the purchase price, and the property had not been sold on the credit of the contractor. To say here that the Government must pay the sales tax is to say that it can never, at any time, employ a contractor to do any work without paying a sales tax to the state on all material the Government buys and pays for and the contractor uses in doing such work.

For the reasons set out herein, I respectfully dissent.

Holt, J., concurs in this dissent.

[File endorsement omitted.]

219 IN THE SUPREME COURT OF ARKANSAS, NOVEMBER  
TERM, 1952

9924

CARL F. PARKER, COMMISSIONER OF REVENUES, APPELLANT

v.

KERN-LIMERICK, INC., APPELLEES

JUDGMENT—January 12, 1953

This cause came on to be heard upon the transcript of the record of the chancery court of Pulaski County, Second Division, and was



argued by solicitors, on consideration whereof it is the opinion of the court that there is error in the proceedings and decree of said chancery court in this cause, in this: The court erred in holding that the sale in question was to the United States and that no tax was due the State of Arkansas.

It is therefore ordered and decreed by the Court that the decree of said chancery court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs, and that this cause be remanded to said chancery court for further proceedings to be therein had according to the principles of equity and not inconsistent with the opinion herein delivered.

It is further ordered and decreed that said appellant recover of said appellee all his costs in this court in this cause expended, and have execution thereof. Justices Holt and Robinson dissent: Justice George Rose Smith not participating.

220

IN SUPREME COURT OF ARKANSAS

[Title omitted]

## PETITION OF KERN-LIMERICK, INC. AND THE UNITED STATES OF AMERICA FOR REHEARING

Appellees, Kern-Limerick, Inc., and the United States of America, pray that they be granted a rehearing in the above styled case, and for grounds say:

1. The Court erred in its conclusion that the United States of America wrote into its contract with the contractor, WHMS, provisions for strict control of all purchases of labor, materials and equipment merely to obtain saving in money and time under a cost-plus contract.

2. The Court erred in its conclusion that before reimbursement is made by the United States of America to the contractor, WHMS, there must be funds appropriated by Congress no earlier than such reimbursement is due to be made.

3. The Court erred in its holding that under the provisions of Arkansas Statutes, 84-1902(c), (i), and 84-1903(e), and under the provisions of the contract between the United States of America and the contractor, WHMS, that WHMS was the purchaser from Kern-Limerick, Inc.

The Court erred in distinguishing the case of *Alabama v. King & Boozer*, 314 U.S. 1, from the present case on the three particular grounds cited by the Court.

5. The Court erred in its holding that the provision of the contract between the contractor, WHMS, and Kern-Limerick, Inc., that the United States of America only was obligated to pay the pur-

chase price makes no real difference in the liability of the contractor, WHMS, to pay the purchase price.

221 6. The Court erred in its holding that the equipment was paid for by the contractor, WHMS, before the equipment was delivered to the site of construction and inspected by the agent of the United States of America.

7. The Court erred in its holding that there was no sale to the United States of America because the United States of America was not obligated to pay until after the contractor, WHMS, had paid the purchase price.

8. The Court erred in its holding that the provision in the contract between the contractor, WHMS, and Kern-Limerick, Inc., to obligate only the United States of America to make payment of the purchase price is ineffective because of the purpose to avoid the State sales tax.

9. The Court erred in its holding that the provision of the contract between the contractor, WHMS, and Kern-Limerick, Inc., that title should vest in the United States of America, and never at any time in WHMS, does not distinguish this case from the case of *Alabama v. King & Boozer*, 314 U.S. 1.

10. The Court erred in its holding that the contractor, WHMS, had title at any time.

11. The Court erred in its holding that under the Armed Services Procurement Act of 1947, the United States of America was without authority to delegate the power to purchase the equipment in the manner in which the equipment was purchased in this case.

12. The Court erred in its holding that the contract between the United States of America and the contractor, WHMS, was under Section 151(c) (11-16), Title 41, USCA, rather than under Section 151(c) (10).

13. The Court erred in its holding that Section 153(b), Title 41, USCA, is not applicable.

14. The Court erred in its holding that under the Arkansas Gross Receipts Act of 1941 a tax on the transaction involved in this case is imposed on the United States of America.

222 WHEREFORE, appellees, Kern-Limerick, Inc., and the United States of America, pray that they be granted a rehearing herein, and that upon rehearing the decree of the Court appealed from be affirmed.

ROSE, MEEK, HOUSE, BARRON & NASH,  
By WILLIAM NASH,  
*Solicitors for Kern-Limerick, Inc., Appellee.*  
BERRYMAN GREEN,  
*Solicitor for United States of America, Intervenor.*

William Nash certifies that he prepared and has read the foregoing petition for rehearing, that he believes that there is merit in

the petition, and that it is not filed for the purpose of delay. He further certifies that a copy of said petition was on the 29th day of January, 1953, delivered in person to O. T. Ward, Solicitor for appellant.

Signed: WILLIAM NASH.

223

IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—February 23, 1953

The petition for rehearing in this cause is denied. Justice George Rose Smith not participating; Justices Holt and Robinson think the petition for rehearing should be granted.

224

IN SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION OF KERN-LIMERICK, INC., AND UNITED STATES OF AMERICA  
FOR APPEAL—Filed May 21, 1953

Considering themselves aggrieved by the final decree and judgment of this Court entered on January 12, 1953, and order denying petition for rehearing entered February 23, 1953, Kern-Limerick, Inc., complainant-appellee, and the United States of America, Intervenor, do hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and order denying the petition for rehearing and from each and every part thereof; that citation be issued in accordance with law; that an order be entered with respect to the appeal bond to be given by said complainant-appellee; that a supersedeas be granted pending the final disposition of this appeal, and that the amount of security, if any, be fixed by the order allowing the appeal; and that the material parts of the record, proceedings, and papers upon which said final judgment and decree and order denying petition for rehearing were based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such cases made and provided.

225 It is further prayed that the mandate to the Pulaski County Chancery Court, Second Division, issued in this case on March 4, 1953, be recalled.

Respectfully submitted,

ROBERT L. STERN,  
*Acting Solicitor General,  
Counsel for the United States.*

A. F. HOUSE,  
WILLIAM NASH,  
*Counsel for Kern-Limerick, Inc.*

[File endorsement omitted.]

226

## IN SUPREME COURT OF ARKANSAS

[Title omitted]

## ORDER ALLOWING APPEAL—Filed May 21, 1953

Kern-Limerick, Inc., complainant-appellee, and United States of America, Intervenor, having made and filed their joint petition praying for an appeal to the Supreme Court of the United States from the final decree and judgment of this Court in this cause entered on January 12, 1953, and order denying petition for rehearing entered February 23, 1953, and from each and every part thereof, and having presented their joint Assignment of Errors and prayer for reversal and their joint statement as to the jurisdiction of the Supreme Court of the United States on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided.

Now, therefore, it is hereby ordered, that said appeal be and the same is hereby allowed as prayed for.

It is further ordered, that the amount of the appeal and supersedeas bond to be filed by the complainant-appellee be and the same is hereby fixed in the sum of \$500.00, with good and sufficient surety, and shall be conditioned as may be required by law, and that the judgment be suspended and stayed until the termination of this appeal.

227 It is further ordered that the mandate heretofore issued on March 4, 1953, in this case and forwarded to the Pulaski County Chancery Court, Second Division, be and it is hereby recalled, and

It is further ordered that citation shall issue in accordance with law.

Griffin Smith,  
*Chief Justice of the Supreme Court of  
the State of Arkansas.*

[File endorsement omitted.]

228 Supersedeas Bond on Appeal for \$500.00 approved May 26, 1953, omitted in printing.

229 Citation in usual form showing service on Carl F. Parker, Commissioner, omitted in printing.

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed  
May 21, 1953

Kern-Limerick, Inc., complainant-appellee, and the United States of America, Intervenor, in the above-entitled cause, in connection with their appeal to the Supreme Court of the United States hereby file the following assignment of errors upon which they will rely in their prosecution of said appeal from the final judgment and decree of the Supreme Court of Arkansas entered January 12, 1953, and order denying petition for rehearing entered February 23, 1953.

The Supreme Court of the State of Arkansas erred:

1. In holding that under the pertinent contract between the United States, Winston Bros. Company, C. F. Haglin and Sons Company, Missouri Valley Contractors, Inc., and Sollitt Construction Company, Inc. (the contractor for the construction of the Naval Ammunition Depot at Shumaker, Arkansas), and the purchase orders issued thereunder to the complainant-appellee, the complainant-appellee made sales to that contractor rather than to the United States.

231 2. In holding that the sales made by the complainant-appellee are validly taxable under the Arkansas Gross Receipts Tax Act of 1941, Act No. 386 of the Acts of Arkansas for 1941 (Arkansas Statutes, 1947, sections 84-1901 to 84-1919).

3. In holding that the sales made by the complainant-appellee were not sales to the United States and are not immune from taxation by the State of Arkansas under the Constitution of the United States.

4. In holding that the United States (through the Navy Department) was without the authority or power to make the purchases in question from the complainant-appellee in the form in which those purchases were made, and in holding that the contract between the United States and the contractor for the construction of the Naval Ammunition Depot at Shumaker, Arkansas, was a delegation of power prohibited by the Armed Services Procurement Act of 1947.

5. In reviewing and overruling the determinations of the proper officials of the Navy Department that the contract with the contractor and the purchase agreements with complainant-appellee were proper under the Armed Services Procurement Act.

6. In holding that the Arkansas Gross Receipts Tax Act of 1941, as applied to the sales involved here, is not repugnant to, and violative of, the Constitution of the United States.

WHEREFORE, complainant-appellee, Kern-Limerick, Inc., and the United States of America, Intervenor, pray that the final judgment

and decree of the Supreme Court of the State of Arkansas be reversed, and for such other relief as the Court may deem fit and proper.

Respectfully submitted,

ROBERT L. STERN,  
*Acting Solicitor General,  
Counsel for the United States.*  
A. F. HOUSE,  
WILLIAM NASH,  
*Counsel for Kern-Limerick, Inc.*

[File endorsement omitted.]

232-233 Statement required by Paragraph 2 of Rule 12 of the Rules of the Supreme Court of the United States (omitted in printing)

234-235 Praecipe (omitted in printing)

236 Clerk's Certificate to foregoing transcript omitted in printing.

237-238 IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed June 18, 1953

a. Appellants adopt for their statement of points upon which they intend to rely on their appeal to this Court the points contained in their Assignment of Errors heretofore filed.

b. Appellants designate the entire record herein for printing by the Clerk of this Court, except that the following may be omitted:

Exhibits A, and C-N (inclusive) to the stipulation (Transcript of Record, pp. 91, 96-225, Incl.).

ROBERT L. STERN,  
*Acting Solicitor General,  
Counsel for the United States,*  
*Appellant.*

A. F. HOUSE,  
WILLIAM NASH,  
*Counsel for Kern-Limerick, Inc.,*  
*Appellant.*

Proof of Service (omitted in printing).

239 [File endorsement omitted.]

240 SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1953

No. 115

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—October 12, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

The Chief Justice took no part in the consideration or decision of this question.



